No. 89-7691-CSH
Status: GRANTED
CAPITAL CASE

Title: Dale Robert Yates, Petitioner
v.
Parker Evatt, Commissioner, South Carolina Department of Corrections, et al.

Docketed:
May 29, 1990

Court: Supreme Court of South Carolina

Counsel for petitioner: Bruck,David

Counsel for respondent: Zelenka,Donald J.

Entry	Date	Note	Proceedings and Orders
1	Apr 19 1990	G	Application (A89-732) to extend the time to file a petition for a writ of certiorari from April 29, 1990 to June 28, 1990, submitted to The Chief Justice.
2	Apr 20 1990		Application (A89-732) granted by the Chief Justice extending the time to file until May 29, 1990.
3	May 29 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Jun 28 1990		Brief of respondents James Aiken, Warden, et al. in opposition filed.
6	Jul 5 1990		DISTRIBUTED. September 24, 1990
8	Oct 1 1990		Petition GRANTED.
			**********
9	Oct 15 1990	G	Motion of petitioner for appointment of counsel filed.
10	Oct 15 1990		DISTRIBUTED. Oct. 26, 1990.
11	Oct 29 1990		Motion for appointment of counsel GRANTED and it is ordered that David I. Bruck, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
12	Nov 8 1990		Joint appendix filed.
13	Nov 15 1990		Brief of petitioner Dale Yates filed.
14	Nov 23 1990		SET FOR ARGUMENT TUESDAY, JANUARY 8, 1991. (4TH CASE)
15	Nov 27 1990		CIRCULATED.
16	Nov 28 1990		Record filed.
		*	4 vol., Supreme Court of SC.
17	Dec 14 1990	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.
18	Dec 14 1990	X	Brief amicus curiae of California filed.
19	Dec 17 1990	X	Brief of respondents Parker Evatt, etc., et al. filed.
20	Dec 28 1990	X	Reply brief of petitioner Dale Yates filed.
21	Jan 8 1991		ARGUED.

ORIGINAL 89-7691

89-7691

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89 -

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, Warden, Central Correctional Institution, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I.

DOES SOUTH CAROLINA'S "HARMLESS ERROR" ANALYSIS OF THE SANDSTROM ERRORS IN THIS CASE, IN WHICH THE STATE COURT CONSIDERED NEITHER PETITIONER'S DEFENSE NOR THE JURY'S LIKELY INTERPRETATION OF THE UNCONSTITUTIONAL INSTRUCTIONS, CONFLICT WITH THE REQUIREMENTS OF ROSE v. CLARK AND CARELLA v. CALIFORNIA?

II.

SHOULD THE COURT GRANT CERTIORARI TO ENFORCE ITS TWO PRIOR REMAND ORDERS INSTRUCTING THE SOUTH CAROLINA SUPREME COURT "TO GRANT THE RELIEF WHICH FEDERAL LAW REQUIRES?"

III.

SHOULD THE COURT GRANT CERTIORARI TO CLARIFY THE HARMLESS-ERROR ANALYSIS TO BE EMPLOYED IN CASES INVOLVING BURDEN-SHIFTING MANDATORY PRESUMPTIONS?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89 -

DALE ROBERT YATES,

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Dale Robert Yates prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The original and revised opinions of the Supreme Court of South Carolina denying Dale Yates's petition for a writ of habeas corpus on remand from the United States Supreme Court are as yet unreported, and are reprinted in the Appendix to this petition A-1 to A-9. This Court's previous opinion reversing the judgment of the South Carolina Supreme Court is reported as Yates v. Aiken, 484 U.S. 211 (1988). The prior opinion of the South Carolina Supreme Court following summary reversal by this Court is reported as Yates

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v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). This Court's first decision granting the petition for writ of certiorari and remanding to the South Carolina Supreme Court is reported as Yates v. Aiken, 474 U.S. 896 (1985). The initial per curiam order of the South Carolina Supreme Court dated May 23, 1985 denying Yates's petition for habeas corpus is unreported. The opinion of the South Carolina Supreme Court affirming Yates's convictions and death sentence on direct appeal is reported as State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1122 (1983).

JURISDICTION

The judgment of the South Carolina Supreme Court on remand from the United States Supreme Court was entered on February 6, 1989. A timely petition for rehearing was denied on January 29, 1990. On April 20, 1990, the Chief Justice of the United States, acting in his capacity as Circuit Justice for the Fourth Circuit, entered an order extending the time for filing this petition to and including May 29, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code §16-3-10 (1976), which provides:

> "Murder" is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

When this case was last here, the Court summarized the facts as follows:

> Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store a fight occurred in which the accomplice and the storekeeper's mother were both killed. Petitioner was convicted of armed robbery and sentenced to death. His conviction and sentence were affirmed by the South Carolina Supreme Court in 1982. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983).
>
> At his trial, petitioner testified that the decedent had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon." A few months after petitioner's conviction was affirmed, the South Carolina Supreme Court held that it was error to give such an instruction. See State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Thereafter, petitioner sought a writ of habeas corpus from the South Carolina Supreme Court, arguing that the burden-shifting instruction given at his trial was unconstitutional under the state court's reasoning in Elmore and under our decision in Sandstrom v. Montana, 442 U.S. 510 (1979). While the application for habeas corpus was pending, we decided another case involving a burden-shifting instruction, Francis v. Franklin, 471 U.S. 307 (1985), and petitioner promptly called that decision to the attention of the state supreme court. The court denied the writ without opinion.

> Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of Francis v. Franklin." Yates v. Aiken, 474 U.S. 896 (1985). On remand the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in Elmore and addressed in Francis v. Franklin." 290 S.C. 232, 234, 349 S.E.2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in Elmore should not be applied retroactively to invalidate a conviction that was final when Elmore was decided.

Yates v. Aiken, 484 U.S. 211, 212-213 (1988). This Court again granted certiorari and reversed, holding that the state court had erred in denying full retroactive effect to Francis v. Franklin. In doing so, the Court stated that when it previously granted certiorari and remanded petitioner's case for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985), Yates v. Aiken, 474 U.S. 896 (1985),

> [o]ur mandate contemplated that the [South Carolina Supreme Court] would consider whether, as a matter of constitutional law, petitioner's conviction could stand in the light of Francis. Since the state court did not decide that question, we shall do so.

484 U.S. at 215. The Court then proceeded to reverse the South Carolina Supreme Court's judgment denying habeas relief, and ordered the state supreme court "to grant the relief that federal law requires." Id., at 218.

On remand, a three-to-two majority of the South Carolina Supreme Court once again denied relief. First, the state court majority asserted that while it was "constrained to accept the high court's mandate that Francis v. Franklin applies here," the state

court interpreted this Court's opinion as meaning that "petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under Sandstrom on direct appeal in state court." Yates v. Aiken, Opinion No. 22962 (S.C., February 6, 1989, amended opinion filed January 29, 1990), infra at Appendix 2 (hereinafter cited as A-2), n. 3. Having thus decreed (despite its own decisions on the merits of the claim) that petitioner was foreclosed from further review as of right in the federal courts, the state court once again denied relief, this time on the ground that the Sandstrom error was harmless. Id., infra at A-2 to A-5.

The state court acknowledged that the trial judge's charge included two separate mandatory presumptions, both of which were erroneous. The first of these was that "malice is presumed or implied by the law from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse." The second was that "malice is presumed or implied from the use of a deadly weapon." A-4, A-14. However, the court went on to assert that because the state prosecuted petitioner on a theory of accomplice liability, his own mental state was irrelevant, and the jury was required only to determine whether petitioner's accomplice Davis had acted with malice when he fatally stabbed the victim. Finding that the jury "would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice," A-4, A-14, the court held the unconstitutional instruc-

tions to be harmless.

Justice Toal, joined by Justice Finney, dissented. The dissent expressed doubt that this Court's prior decision authorized the state court to engage in a harmless-error analysis on remand, and concluded in any event that the errors were not harmless. Without disputing the majority's description of South Carolina's law of accomplice liability, Justice Toal pointed out that its application to this case was complicated by the fact that petitioner had set up a defense of withdrawal, and thereby created a substantial factual question as to whether petitioner could be held accountable for Davis' homicidal act under an accomplice liability theory. The dissent continued:

> Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the trial judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial.

Yates v. Aiken, Opinion No. 22962 (S.C., filed February 6, 1989) (Toal, J., dissenting), infra at A-8.

Petitioner sought rehearing on two grounds. First, he noted that in stating that it would not "redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of accomplice liability," the state court majority had apparently overlooked the reasonable possibility that the jury

may have found it unnecessary to make the factual findings referred to--that the killing of Helen Wood was the natural and probable consequence of the original plan to commit robbery--because the erroneous malice instructions required the jury to presume the element of malice against Yates by virtue of no more than the state's proof that he used a deadly weapon. In addition, he suggested that in stating the facts most favorably to the state, and thereby omitting such evidence as Yates' testimony surrounding the shooting of Willie Wood and his insistence that the robbery plan contemplated nonviolent withdrawal in the event of any resistance, see Yates v. Aiken, 484 U.S. 211, 212 (1988), the state court majority opinion may have improperly failed to indulge the reasonable possibility that the jury might have credited the defendant's version of events. Yates v. Aiken, Petition for Rehearing at 1-2 (filed S.C. Sup. Ct., February 16, 1989).

After considering this petition for nearly a year, the state court denied rehearing by another three-to-two vote. Infra at A-10. The majority did make one substantial change in its opinion, however. Where the original opinion has stated that "[i]n the context of accomplice liability for murder, the element of malice which must be proved is that of the killer," A-4 (emphasis in original), the amended opinion substituted for this sentence the words, "[O]n the facts of this case, as charged by the trial judge, the element of malice relied on by the state is that of the killer, Henry Davis." Yates v. Aiken, supra, infra at A-14. The majority

opinion did not quote or cite any portion of the trial judge's charge in support of this assertion. Nor did the court discuss or even acknowledge petitioner's argument that the state had urged as an alternative theory of petitioner's guilt that he had specifically intended the murder of Mrs. Wood from before the time that he entered the store, and that the jury might have employed the burden-shifting presumptions in order to convict on this alternative theory of petitioner's guilt.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

As noted above and in this Court's prior opinion, the underlying Sandstrom issue in this case was first raised in state post-conviction proceedings in the South Carolina Supreme Court, and was addressed on the merits by that court in Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Yates v. Aiken, 484 U.S. 211, 213, 217-18 (1988). The question of whether the unconstitutional burden-shifting jury instructions given by the trial judge could be disregarded as harmless was addressed and decided by the South Carolina Supreme Court in its most recent opinion on remand from this Court.

WHY THE WRIT SHOULD BE GRANTED

Ever since January 14, 1985, when he initiated this proceeding in the South Carolina Supreme Court, petitioner has sought to have that court grant him the relief which the federal constitutional plainly entitles him. The state court first denied relief without opinion. Then, presented with an order of this Court intended to

have the state court determine "whether, as a matter of federal law, petitioner's conviction could stand in the light of Francis," Yates v. Aiken, 484 U.S. 211, 215 (1988) the South Carolina court instead announced that the principles applied in Francis were not to be given retroactive effect, and again denied relief. Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). This Court unanimously reversed. Yates v. Aiken, 484 U.S. 211 (1988). On remand, a three-to-two state court majority denied relief yet again, this time adopting a harmless-error analysis which respondents had pressed before it on two prior occasions,[1] but which the state court had previously failed to so much as acknowledge, much less accept.

Petitioner will concede that under normal circumstances, a state court's harmless-error determination would not call for the exercise of this Court certiorari jurisdiction. But there are special reasons why certiorari should be granted here.

1. The Court should intervene to correct the South Carolina state court majority's persistent refusal to enforce petitioner's constitutional rights in the face of this Court's previous directives.

The first reason warranting review is the extraordinary lengths to which the state court majority has gone, in the face of

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[1]Both in their initial response to the state habeas petition in this case, filed on February 14, 1985, and in its brief filed on February 19, 1986 in the South Carolina Supreme Court following this Court's first remand order, Yates v. Aiken, 474 U.S. 896 (1985), respondents argued that any constitutional error in the presumptions of malice charged by the trial judge were harmless beyond a reasonable doubt.

two successive remand orders by this Court, to avoid granting the relief to which petitioner is plainly entitled under the Due Process Clause of the Fourteenth Amendment. Each time this Court has remanded petitioner's case, the state court majority has identified a different state law ground for denying relief. First, the state court discovered an illusory issue concerning the retroactivity of its own decisions implementing Sandstrom v. Montana, and declined to implement this Court's order requiring reconsideration in light of Francis v. Franklin on that basis. Now, its judgment having been again reversed, the state court characterizes its denial of relief as based on substantive South Carolina law governing accomplice liability. In doing so, the state court majority has employed an impermissibly expansive version of harmless-error review, while ignoring all of the record evidence showing the prejudicial effect of the unconstitutional instructions.

It is significant that the state court reached its harmless-error conclusion after first announcing that its disposition of petitioner's Sandstrom claim was immune from federal habeas corpus review. While this attempt to limit the reach of federal habeas review is plainly wrong as a matter of federal law, County Court of Ulster County v. Allen, 442 U.S. 140, 147-154 (1979), the state court's statement is significant for the hostility which it reveals toward federal enforcement of petitioner's federal constitutional rights. This hostility may have motivated the state court majority

to adopt yet again a logically and factually meritless basis for denying the relief to which petitioner is entitled. Under these circumstances, the fact that the majority once again describes its ruling as simply an application of South Carolina law should no more insulate the state court's holding from review by this Court than it did when this case was last here.

2. The state supreme court's harmless-error analysis is plainly erroneous.

The basis of the state court's most recent holding is its assertion that petitioner was convicted of murder under South Carolina's law of parties, which holds each participant in a dangerous felony liable as a principal for all of the foreseeable consequences of that felony. State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939). According to the state court, the prosecution was required to do no more than prove petitioner's intent to participate in the robbery of the victim's store in order to convict him as her murderer, so long as the malicious intent of the actual killer, Davis, was also established.

This argument overlooks the issues created both by petitioner's defense and by the prosecution's theory of the case. It was petitioner's contention that he had abandoned the robbery prior to Mrs. Wood's arrival on the scene, that he had communicated this abandonment to his accomplice, that he never saw Mrs. Wood at the scene, and that he was not legally responsible for her death. Tr. 1092-1099. Petitioner further testified that prior to entering the

victim's store, he and Davis had planned to abandon the robbery and flee the scene without harming anyone if the proprietor refused to give them the money. Tr. 1084-1085. Petitioner did admit to superficially wounding the victim's son, Willie Wood, after Mr. Wood appeared to reach for a gun under the counter. Tr. 1097-1098. But petitioner then ran from the store while urging Davis to do the same. The evidence thus permitted the jury to conclude that Davis' action in killing Mrs. Wood was sufficiently far removed from the original conspiracy to commit robbery, and that petitioner had sufficiently abandoned that conspiracy prior to Mrs. Wood's arrival on the scene, so as to free petitioner from liability under the law of parties.

Petitioner recognizes, of course, that the jury could have convicted him under an accomplice liability theory. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). But in order to establish harmlessness under even the most flexible application of the harmless error doctrine, compare Rose v. Clark, 478 U.S. 570, 579, 583 (1986), with Carella v. California, ___ U.S. ___, 109 S.Ct. 2419, 2421-24 (1989) (Scalia, J., concurring), respondents must show more than this: they must establish that the jury had no rational alternative but to convict in the absence of the presumption. And here, such a claim conflicts with both the evidence and South Carolina law. South Carolina's law of accomplice liability is inapplicable unless the jury finds that a homicide was the probable result of the acts actually agreed upon by the co-

conspirators. State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985). Thus the nature and scope of the prior felonious agreement, and the extent to which the parties were acting in accord with the agreement when the killing occurred, are questions of fact which must be determined by the jury on the basis of the evidence presented. In this case, the jury could have been left with a reasonable doubt as to petitioner's guilt under accomplice liability principles, considering both the prior agreement to retreat without using force, and petitioner's effort to flee the scene and to urge his accomplice to do likewise prior to the victim's arrival in the store. However, these facts were effectively neutralized by the trial judge's instruction that "malice is presumed or implied from the use of a deadly weapon." For this reason, the unconstitutional jury instructions could not have been disregarded as harmless even had the accomplice liability theory now stressed by respondents been the only theory under which petitioner was prosecuted.[2]

This leads to the second reason why the constitutional errors in the court's instructions cannot be disregarded as harmless. Although the state court's opinion includes no acknowledgement of this fact, the record plainly reveals that the prosecution employed

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[2]In this connection, the state court opinion ignores the fact that the trial judge never specified whose deadly weapon he was referring to when he instructed the jury to presume malice from its use. The state court majority seems to have decided this case on the unwarranted assumption that the jury would have understood this instruction to refer only to the knife wielded by Davis, and not to the gun which petitioner used during the robbery.

an alternative theory of liability in persuading the jury to convict petitioner of Mrs. Wood's murder. Faced with the possibility that the jury would accept petitioner's testimony and reject the state's case for murder under a theory of vicarious liability, the prosecutor asserted as an alternative theory at trial that petitioner and Davis had actually intended from the outset to kill any witnesses to the robbery, including Mrs. Wood. Tr. 1172-1176. This argument, which was based on circumstantial evidence,[3] sought to convict petitioner by establishing his own malicious intent in the actual killing of Mrs. Wood. While it is unlikely that the jury would have accepted this assertion by the state simply on the strength of the evidence presented, the prosecution's burden was substantially lightened by the trial judge's instructions on the presumptions of malice arising from the doing of an unlawful act and from the use of a deadly weapon. The reason for this is that the presumptions could reasonably have been interpreted as directing the jury to find that petitioner entertained actual malice in the murder of Mrs. Wood, under the state's intent-to-kill theory, solely on the basis of evidence that he employed a deadly weapon and that he had intentionally committed an unlawful act--robbery--prior to the killing. Since the evidence was obviously

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[3]The prosecutor stressed that the robbers did not conceal their identity, and asserted that Davis' use of a knife in the robbery, and his order to Willie Wood to bend over the counter, showed both robbers' pre-existing plan to commit murder without creating any noise or attracting attention. The prosecutor also argued that petitioner and Davis probably saw Mrs. Wood outside the store just before the robbery. Tr. 1172.

not "so dispositive of [petitioner's] intent that the jury would have found it unnecessary to reply on the presumption," Connecticut v. Johnson, 460 U.S. 73, 97 n. 5 (1983) (Powell, J., dissenting), the state court majority's harmless error determination is flawed, and should be reversed. Rose v. Clark, 478 U.S. 570, 583-84 (1986).

3. The Court should grant certiorari to determine the appropriate mode of harmless-error analysis in cases involving mandatory rebuttable presumptions of an essential element of the offense charged.

In the foregoing discussion of the South Carolina Supreme Court's harmless error holding in this case, petitioner has assumed the applicability of a relatively permissive mode of harmless error analysis, namely, whether the record as a whole established beyond a reasonable doubt that the jury's verdict would have been the same in the absence of the unconstitutional instruction. But as Justice Scalia has recently pointed out in his concurring opinion in Carella v. California, ___ U.S. ___, 109 S.Ct. 2419, 2424 (1989), the majority opinion in Rose v. Clark, 478 U.S. 570 (1986) can be read to authorize two quite different forms of harmless error analysis in cases involving Sandstrom violations. Under one interpretation of Rose v. Clark, a reviewing court must determine, in order to deem a Sandstrom violation harmless, that the predicate facts which were actually proven beyond a reasonable doubt so conclusively established the presumed fact that the jury may actually be said to have found "'every fact necessary' to establish

every element of the offense beyond a reasonable doubt." Rose v. Clark, supra, 478 U.S. at 580-81. However, as Justice Scalia pointed out in Carella, "[e]lsewhere . . . Rose says that usual harmless-error analysis is applicable: 'Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.' 478 U.S. at 579." 109 S.Ct. at 2424.

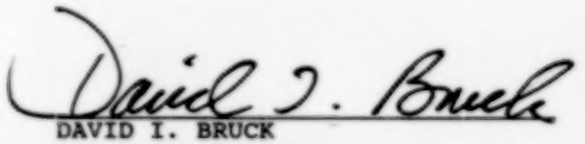
Underlying these two different formulations of the harmless error test are different legal inquiries: the relatively permissive test focuses simply on whether the evidence establisnes the defendant's guilt, while the stricter one requires proof that his guilt was determined by the jury, and not by direction of the trial judge. Compare United States v. Hasting, 461 U.S. 499, 509 (1983) (harmlessness of improper prosecutorial argument must be determined in basis of "the trial record as a whole"), with Connecticut v. Johnson, 460 .S. 73, 87 (1983) (plurality opinion) (conclusive presumption cannot be harmless except in rare situations, such as where presumed element was admitted by defendant). For the reasons set forth above, petitioner submits that the errors in this case cannot be disregarded as harmless under either mode of harmless-error analysis. But in view of the evident ambiguity in this Court's precedents concerning the proper mode of analyzing the prejudicial effect of conclusive or burden-shifting presumptions in criminal cases, petitioner submits that the Court should grant

certiorari to answer that question.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,



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May 29, 1990

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No. 89 -

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A P P E N D I X

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dale Robert Yates,.....Petitioner,

v.

James Aiken, Warden, CCI, and the Attorney General, South Carolina,.....Respondents.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Opinion No. 22962

Submitted June 6, 1988 - Filed February 6, 1989

PETITION DENIED

David I. Bruck and John H. Blume, both of Columbia; and S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General T. Travis Medlock and Chief Deputy Attorney General Donald J. Zelenka, of Columbia, for Respondents.

GREGORY, C.J.: This case is before us on a petition for writ of habeas corpus. We deny the petition.

In 1981 petitioner was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. He was sentenced to death. The convictions and sentence were affirmed on appeal to this Court. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983).

Petitioner's subsequent application for post-conviction relief was denied by the circuit court in 1984. He then petitioned this Court for review of that denial by way of writ of certiorari. He simultaneously petitioned for habeas corpus relief on the ground the trial judge's charge on implied malice

was improper under state law[1] and under Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in Francis v. Franklin. Yates v. Aiken, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

On remand this Court clarified the denial of the petition under state law.[2] Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Dissatisfied with this Court's disposition under Francis v. Franklin, however, the United States Supreme Court reversed the denial of the petition for habeas corpus. Yates v. Aiken, 484 U.S. ___, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It held Francis v. Franklin, which condemns a mandatory presumption regarding proof of an element of the crime, applies retroactively to cases pending on collateral review because it merely reiterates the principles announced in the 1979 decision of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] This case was again remanded for further proceedings consistent with the Supreme Court's opinion. 98 L.Ed.2d at 554.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

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[1]Petitioner argued that under State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2]We held retroactive application of Elmore is limited to cases pending on direct appeal at the time Elmore was decided and does not apply to collateral attacks. See McClary v. State, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3]We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under Sandstrom on direct appeal in state court. Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); cf. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930 (1980) (wherein petitioner in Francis v. Franklin raised mandatory presumption issue under Sandstrom in state court). Of course, we are constrained to accept the high court's mandate that Francis v. Franklin applies here.

In Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court held jury instructions that violate Francis v. Franklin are subject to a harmless error analysis. The reviewing court must determine whether on the whole record the erroneous mandatory presumption is harmless beyond a reasonable doubt. 92 L.Ed.2d at 474. The pertinent inquiry is whether the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption. Id. Such an inquiry requires us to review the trial judge's charge and the facts of this case in the context of the malice element of the offenses charged.

We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Gilbert, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on

tne theory of accomplice liability.[4]

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. Rose v. Clark, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the jury: "malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon . . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S. C. Code Ann. § 16-3-10 (1985). In the context of accomplice liability for murder, the element of malice which must be proved by the State is that of the killer. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or implied. State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

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[4]To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

Pursuant to Rose v. Clark and based on our exhaustive review of the record, we hold any error under Francis v. Franklin is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder. The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In 1983, this court held that it was error for a trial judge to instruct a jury in a case that malice is mandatorily presumed from the use of a deadly weapon. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Prior to our decision in Elmore, we had affirmed Yates' conviction on direct appeal [State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982)] and summarily denied his petition for a writ of certiorari.

In 1985, the United States Supreme Court reversed a murder conviction and death penalty sentence in Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), holding that where the accused's only defense is that he did not have the required intent to kill, an instruction that intent is presumed from the use of a deadly weapon is error and cannot be considered harmless.

Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in Francis v. Franklin. See, Yates v. Aiken, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in State v. Elmore, supra, and Francis v. Franklin. We, however, declined to apply the State v. Elmore standard retroactively. Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). The retroactive application of Francis v. Franklin and the application of Sandstrom v. Montana was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in Francis' was responsive to our mandate, but the discussion of the question whether the decision in Elmore should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of Francis, the Supreme Court analyzed the issue of the retroactivity of Francis v. Franklin to foreclose any further analysis by this court. The Court held that Francis v. Franklin was merely a reaffirmation of its holding in the 1979 Sandstrom opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under Francis v. Franklin. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of Francis, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding Yates "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error

analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in Francis v. Franklin was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the Franklin issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to Rose v. Clark, 478 U.S.570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of Francis v. Franklin. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming arguendo that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under Rose v. Clark, then, in my opinion, we are still obliged to afford Mr. Yates a new trial because the erroneous charge which created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erronous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Supreme Court has mandated.

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the theory of accomplice liability. To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. Rose v. Clark, 92 L.Ed.2d at 474.

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Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S. C. Code Ann. § 16-3-10 (1985). On the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or implied. State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

Pursuant to Rose v. Clark and based on our exhaustive review of the record, we hold any error under Francis v. Franklin is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

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Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under Francis v. Franklin. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of Francis, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding Yates "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error

analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in Francis v. Franklin was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the Franklin issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to Rose v. Clark, 478 U.S.570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of Francis v. Franklin. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming arguendo that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under Rose v. Clark, then, in my opinion, we are still obliged to afford Mr. Yates a new trial because the erroneous charge which created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Supreme Court has mandated.

FINNEY, A.J., concurs.

GREENVILLE COUNTY COURT
OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DALE ROBERT YATES

EXCERPTS FROM JUDGE'S CHARGE TO JURY

April 30, 1986

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[Tr. 1200]

Ladies and gentlemen, a most important rule of evidence that obtains in this state is this: Any defendant who is charged with the commission of any crime and brought into this courtroom to answer for it is presumed by the law to be innocent, and that presumption of innocence would remain with him throughout the trial and even when you go to your jury room, and it would remain with him until the State has proven beyond a reasonable doubt that he is, in fact, guilty of one or more of the charges made against him.

I tell you that that burden of proof by the State and by which you must be convinced is made up or consists solely of the evidence which you have heard from that witness stand or exhibits which have been placed before you and which you will have with you in your jury room and, of course, the law as I explain it to you within the context of which the State must prove this guilt beyond a reasonable doubt. It is from evidence and testimony presented in this courtroom that you must be convinced beyond a reasonable doubt, before the presumption of innocence which clothes him from beginning to end of the trial could fall away from him. That is not merely a

theory that some lawyer thought of, it is a very substantial right that every citizen in South Carolina is entitled to.

I am confident that when you go to your jury room, you will give this Defendant the benefit of the presumption of his innocence.

Ladies and gentlemen, the burden of proving the charges made against this Defendant rests on the State of South Carolina; in this case, Mr. Wilkins, who is the Solicitor here and his assistant, Mr. Traxler, are required by the law, that is, the burden that we are talking about; they are required to present to you evidence, exhibits, by cross-examination of any of the witnesses; they must present before you competent evidence which establishes, beyond a reasonable doubt, the material elements of each of these charges before you could convict the Defendant of any of these charges.

The Defendant does not have to prove that he's innocent. He does not have to disprove that he's guilty. The State must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant.

Ladies and gentlemen, reasonable doubt is a phrase that you have all heard, and it means the same thing in the law as it does in ordinary, everyday English language: that is, a doubt for which you have a real reason. However, that excludes fanciful doubts or whimsical doubts, because anyone could doubt any proposition if you wanted to, but reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason. So, it's to that degree of proof that the State must prove the elements of these charges. When I begin explaining the individual elements to you, bear in mind that it's the State's burden to establish these to you by that degree of proof which I have just defined.

• • • •

[Tr. 1206]

I tell you that a deadly weapon, within the meaning of the law, is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

Ladies and gentlemen, the State also charges that on February 13th, the Defendant, Dale Yates, committed the crime of murder in Greenville County. Madam Foreman and ladies and gentlemen, murder is the unlawful killing of any human being with malice aforethought, either expressed or implied: that is the definition of murder in South Carolina.

In order to convict one of murder, the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought, and such proof must be beyond any reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" or "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.

Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before a commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be a combination of previous evil intent and the act which produces the fatal result.

I tell you, however, that the State is not required to prove any motive for a particular killing.

Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present,

participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused which proximately lead to the accomplishment of the criminal purpose. The commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commission of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, notwithstanding any attempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with resulting lack of responsibility for a homicide committed by a confederate.

I tell you, however, that withdrawal from the scene of the crime may be considered by you along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

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ORIGINAL

Supreme Court, U.S.
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JUN 28 1990
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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

No. 89-7691

October Term 1989

Dale Robert Yates,

Petitioner,

vs

James Aiken, Warden, Central Correctional Institution, and the Attorney General of South Carolina,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I.

DOES THE SOUTH CAROLINA SUPREME COURT'S "HARMLESS ERROR ANALYSIS" IN THIS CASE COMPORT WITH THE MANDATES OF THIS COURT'S DECISION IN YATES V. AIKEN, 484 U.S. 211 (1988) AND ROSE V. CLARK, 478 U.S. 570 (1986)?

II.

SHOULD THIS COURT GRANT CERTIORARI IN THIS CASE WHERE THE HARMLESS ERROR ANALYSIS PERFORMED BY THE SOUTH CAROLINA SUPREME COURT FULLY COMPLIES WITH THIS COURT'S MANDATES IN YATES V. AIKEN, 484 U.S. 211 (1988) AND ROSE V. CLARK, 478 U.S. 570 (1986)?

III.

SHOULD THIS COURT GRANT CERTIORARI TO CORRECT OR CLARIFY THE HARMLESS ERROR ANALYSIS PERFORMED BY THE SOUTH CAROLINA SUPREME COURT?

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Respondents, above named, make Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina in Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989).

ORDER BELOW

The decision of the Supreme Court of South Carolina dated February 6, 1989, is reported at Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). This matter came before the Supreme Court of South Carolina pursuant to this Court's decision in Yates v. Aiken, 484 U.S. 211 (1988).

JURISDICTION

The Respondent concurs in the statement of jurisdiction presented in the Petitioner's Petition for Writ of Certiorari and

submits that this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ... .

2. This case also involves S.C. Code Ann. §16-3-10 (1984 Cumm. Supp.), which provides:

> Murder is the killing of any person with malice aforethought, either express or implied.

PROCEDURAL HISTORY

On or about February 13, 1981, the Petitioner, Dale Robert Yates, was arrested and charged with murder, armed robbery, assault and battery with intent to kill and conspiracy to commit armed robbery. The Petitioner was subsequently indicted at the April, 1981, term of the Greenville County Grand Jury. He was indicted for the aforementioned offenses and his case was called to trial on April 27, 1981, before the Honorable C. Anthony Harris, Circuit Judge, and a jury. The jury convicted Petitioner on all charges. In the sentencing phase of Petitioner's bifurcated trial, the jury sentenced him to death on May 2, 1981. The Petitioner then filed a timely Notice of Intent to Appeal in the South Carolina Supreme Court. His conviction and sentence was subsequently affirmed in State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982). Thereafter, the Petitioner petitioned this

Court for a Writ of Certiorari which was denied in Yates v. South Carolina, 462 U.S. 1124 (1983).

The Petitioner then filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court challenging a jury instruction on malice that was not objected to or ruled on in the trial court nor raised in the direct appeal or pursuant to the State's Uniform Post-Conviction Relief Statute, S.C. Code Ann. §17-27-10, et seq. (1976). The Petitioner made a Petition for Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, which consolidated the Petition along with a pending appeal on a Post-Conviction Relief Application that was presented to the State Supreme Court in which there was no challenge to the malice instruction. After the State made its Return to the Petition, the Supreme Court of South Carolina denied and dismissed both the appeal based on the State's Post-Conviction Relief Application and a Writ of Habeas Corpus in the original jurisdiction of the State Supreme Court.

The Petitioner once again petitioned this Court for a Writ of Certiorari to the Supreme Court of South Carolina. This Court granted the Petition for Writ of Certiorari stating that "[t]he judgment is vacated and the case is remanded to the Supreme Court of South Carolina for further consideration in light of Francis v. Franklin, 471 U.S. 307 (1985)." Yates v. Aiken, 474 U.S. 896 (1985). On remand to the Supreme Court of South Carolina, it was once again noted by the South Carolina Supreme Court that "[n]o objection to the charge was made, and the issue was not raised on

direct appeal." Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84, 85 (1986). However, the South Carolina Supreme Court went on to rule that it would not retroactively apply its decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), to the charge in this particular case. On remand from this Court, the Supreme Court of South Carolina in essence ruled that the Petitioner was not entitled to the retroactive benefit of a different malice charge.

Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Once again, the Petitioner petitioned this Court for a Writ of Certiorari. In Yates v. Aiken, 484 U.S. 211 (1988), this Court remanded this case to the South Carolina Supreme Court "for further proceedings not inconsistent with this opinion." Yates v. Aiken, 484 U.S. at 212.

On remand, the Supreme Court of South Carolina analyzed this case both in light of this Court's mandates in Yates v. Aiken, 484 U.S. 211 (1988) and the decision of this Court in Rose v. Clark, 478 U.S. 570 (1986). Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). On remand, the Supreme Court of South Carolina found that the improper malice instruction was harmless pursuant to this Court's opinion in Rose v. Clark, supra. Initially, the South Carolina Supreme Court issued an unpublished opinion in this matter on June 6, 1988. (Petitioner's Appendix, A-1). However, the Petitioner subsequently filed a Petition for a Rehearing in the South Carolina Supreme Court. Pursuant to the Petition for Rehearing, the South Carolina Supreme Court issued a slightly modified opinion on January 29, 1990. Yates v. Aiken,

___ S.C. ___, 391 S.E.2d 530 (1989). It is from this decision that the Petitioner now appeals.

STATEMENT OF FACTS

The overwhelming, if not the only, evidence in the record reveals that the Petitioner agreed, planned and conspired with Henry Davis and David Loftis to perpetrate burglaries and/or robberies in the Greenville County area, which included the store in question where the crime occurred. The testimony in this regard is not merely overwhelming but it is supported by the Petitioner's own testimony at trial. In fact, at trial the Petitioner admitted that some ten days prior to the incident in question he along with David Loftis or Henry Davis, or both men, were planning and conspiring to carry out burglaries in the Greenville County area. (Tr. p. 808, line 2 - p. 832, line 9; Tr. p. 1061, lines 4-18; Tr. p. 1065, line 11 - p. 1069, line 14; Tr. p. 1109, line 14 - p. 1110, line 11; Tr. p. 1111, line 21 - p. 1113, line 17; Tr. p. 1115, lines 1-25). As this testimony reveals, on February 12, 1981, David Loftis, Henry Davis and Petitioner, Dale Yates, talked about various places to rob. (Tr. p. 813, lines 21-24; Tr. p. 815, lines 5-12). This testimony further reveals that it was the Petitioner who acquired the pistol which was to be used in the robbery. The testimony of both Petitioner and David Loftis indicates that the Petitioner obtained the gun from his brother. (Tr. p. 816, line 23 - p. 819, line 10). The three men spent the night of February 12th together in the same apartment. On the following morning of February 13, 1981, all three men drove around the Greenville

County area in the same car checking out various stores for the possibility of committing an armed robbery. While riding around, David Loftis testified that he told Davis and the Petitioner that if they were caught, they could receive a substantial sentence for armed robbery and possibly the electric chair if someone were killed. (Tr. p. 820, line 20 - p. 825, line 14). The three men were unable to agree on a particular place to rob that morning.

However, at approximately 3:00 p.m. in the afternoon, Henry Davis and the Petitioner left David Loftis at a nearby mall, because he wished to visit his girlfriend who worked there. Petitioner and Davis drove away with the pistol under the passenger side of the front seat. (Tr. pp. 828-829). The overwhelming testimony in the record indicates that the Petitioner and Davis subsequently decided upon Wood's Store as a likely target for their robbery. The Petitioner himself testified that they entered Wood's Store for the purpose of committing an armed robbery. (Tr. p. 1084, line 23 - p. 1085, line 6; Tr. p. 1086, line 24 - p. 1087, line 14; Tr. p. 1092, lines 16-25). The Petitioner and Davis entered Wood's Store together. They approached Willie Wood, who was behind the counter, and demanded his money at gunpoint. Again, Petitioner was armed with a pistol, while Davis was armed with a knife. (Tr. p. 911, line 20 - p. 940, line 10). According to Petitioner's own testimony at trial, he not only walked in Wood's Store and threatened Willie Wood with a pistol, but it was Petitioner who first demanded that Willie Wood turn over all of his money. (Tr. p. 1128, line 19 - p. 1130, line 3). Davis then

made the same threat and demand while wielding his knife in a stabbing motion. Willie Wood then gave Davis approximately $3,000.00 and Davis handed the money to Petitioner. (Tr. p. 1095, lines 13-22). Davis then directed Willie Wood to bend over the store counter but Wood refused to do so after noticing Davis' stabbing motions with the knife. (Tr. pp. 914-915; Tr. p. 922, line 17 - p. 923, line 3; Tr. p. 930, lines 16-25). When Willie Wood refused Davis' demands, Yates testified that he shot Wood two times, as he stood approximately two steps or six to ten feet from the door of the store. He then left the store after determining both that Wood was unarmed and a previously unseen female was present. (Tr. pp. 1097-1098; Tr. p. 1093, lines 1-7). The overwhelming testimony in the record also indicates that as Petitioner fired the shots at Willie Wood. Mr. Wood was standing in such a way as to be facing the Petitioner with his arm outstretched toward Petitioner and his hand opened in a defensive posture. The testimony further reveals that the bullet which struck Willie Wood first struck him in the palm of his outstretched hand, passed through his hand and struck him in the chest severely injuring him. (Tr. p. 911, line 20 - p. 931, line 6; Tr. p. 951, line 10 - p. 953, line 10). As Petitioner left the store, he ran to the getaway car and entered on the passenger side. The Petitioner testified that he waited briefly for Davis, but fearing that Davis might have gotten into trouble or been caught, he moved over underneath the steering wheel and drove away alone. (Tr. p. 1098, line 7 - p. 1099, line 3).

At the time Petitioner shot Willie Wood and turned to leave

the store, it would appear that Wood attempted to go to the front of the counter and Davis attempted to go around the end of the counter in order to stop him. At this time, Willie Wood's 68-year old mother, Helen Wood, attempted to help Willie Wood by grabbing Davis. (Tr. p. 916, line 17 - p. 917, line 2; Tr. p. 922, line 17 - p. 923, line 3). A scuffle ensued between the three, and Helen Wood fell to her hands and knees. By this time, Willie Wood testified that he was able to get to a pistol which he had been wearing underneath his coat. He then shot Davis several times until Davis fell and dropped the knife to the floor. Davis was killed instantly. (Tr. p. 916, lines 3-12; Tr. p. 927 - p. 928, line 6; Tr. p. 918, line 21). Though Willie Wood was severely injured and bleeding, he saw his mother on her hands and knees and watched her die as she fell to the floor from a knife wound which had penetrated her chest and the outer wall of her heart. (Tr. p. 917, line 19 - p. 918, line 21; Tr. p. 954, line 16 - p. 955, line 23). Within seconds, other people came into Wood's Store and assisted Willie Wood with his injuries and aided him in contacting paramedics and police. (Tr. p. 886, line 24 - p. 895, line 21; Tr. p. 897, line 23 - p. 903, line 5).

Petitioner was apprehended later that afternoon after his vehicle was spotted by law enforcement authorities. (Tr. p. 961, line 18 - p. 971, line 6). The pistol and the money were also recovered and Petitioner admitted that he had attempted to hide the pistol and the money. (Tr. p. 982, line 17 - p. 987, line 10; Tr. p. 1137, line 11 - p. 1138, line 24).

THE TRIAL COURT'S INSTRUCTIONS

During the trial, the trial court, without objection, instructed the jury on murder and the elements of malice. In pertinent part, the malice charge is as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words 'express' and 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.
>
> Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.
>
> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances

surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be the combination of the previous evil intent and the act which produces the fatal result.

(Tr. pp. 1207-1208). (Emphasis added). The trial court also gave the jury instructions concerning the "hand of one, hand of all" doctrine in South Carolina, or as it is sometimes referred to, the doctrine of accomplice liability.

> If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present, participating in the unlawful undertaking, are as guilty as the one who committed the final act. The common purpose may not have been to kill and murder, but if it was unlawful, and [if] the execution of this unlawful common purpose involves the probable contingency of taking human life, and during the commission of the unlawful purpose a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

(Tr. p. 1209, lines 7-23). The trial court also gave the jury instructions to the effect that a defendant is not responsible for a homicide committed by a co-defendant as an independent act

growing out of private malice or ill will which the slayer had toward the deceased (Tr. p. 1210):

> A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

[Tr. p. 1210, line 7 - p. 1210, line 15].

The trial court also went on to give appropriate instructions on the law of withdrawal and abandonment:

> One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw notwithstanding any attempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with a resulting lack of responsibility for a homicide committed by a confederate.
>
> I tell you, however, that withdrawal from the scene of the crime may be considered by you

> along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

[Tr. p. 1210, line 16 - p. 1211, line 21].

After the conclusion of the charges, trial counsel and the court had the following dialogue concerning the instruction on withdrawal:

> THE COURT: Mr. Mauldin, well, I, at no time ever intimated that you had the burden of proof. I don't think I did.
>
> MR. MAULDIN: That is correct. I don't recall any inference or statement that we did have the burden, it was simply a recitation of the fact that we might present that (withdrawal) as a defense ... .

(Tr. p. 1217). The jury convicted the Petitioner of murder, armed robbery and assault and battery with intent to kill. He was sentenced to death on the murder charge. For a detailed statement of the procedural history of this case following conviction and sentencing, see the Respondent's Procedural History, supra.

WHETHER THE FEDERAL QUESTION WAS RAISED
AND DECIDED BELOW

The present Petition for Writ of Certiorari is from the South Carolina Supreme Court's decision in Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). The South Carolina Supreme Court issued this decision pursuant to this Court's opinion in Yates v. Aiken, 44 U.S. 211 (1988). In its opinion, the Supreme Court of South Carolina addressed the issue of whether the jury instructions regarding malice improperly shifted the burden of

proof and, if so, were they harmless beyond a reasonable doubt? In its opinion, the South Carolina Supreme Court concluded that the judge's instructions regarding malice were in error; however, in light of this Court's opinion in Rose v. Clark, 478 U.S. 570 (1986), the instructions in question were harmless beyond a reasonable doubt.

WHY THE WRIT SHOULD NOT BE GRANTED

1. The South Carolina Supreme Court properly adhered to the decisions of this Court in finding the trial court's instructions to be harmless beyond a reasonable doubt.

In Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989), the South Carolina Supreme Court properly adhered to the governing precedents of this Court in following the mandates set out in Yates v. Aiken, 484 U.S. 211 (1988). In Yates v. Aiken, 484 U.S. 211 (1988), this Court rejected the retroactivity analysis of the South Carolina Supreme Court as set forth in Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). This Court reversed the judgment of the South Carolina Supreme Court and reversed and remanded for further proceedings consistent with this Court's opinion. Yates, 484 U.S. at 217. In this Court's most recent opinion on this matter, it, however, did not consider whether the challenged jury instruction was harmless beyond a reasonable doubt under Rose v. Clark, supra. Furthermore, and most important, this Court did not direct the South Carolina Supreme Court to issue the Writ of Habeas Corpus, nor did it direct that Petitioner be granted a new trial. The specific language used by this Court was that "the case is remanded for further proceedings not inconsistent with

this opinion." Yates, 484 U.S. at 217. Contrary to Petitioner's assertions, the South Carolina Supreme Court did precisely what it was directed by this Court to do.

In remanding this matter for reconsideration by the South Carolina Supreme Court, this Court in no way indicated that the State Supreme Court should have disregarded other decisions of this Court in analyzing the jury charge for error pursuant to Francis v. Franklin, 471 U.S. 307 (1985). This is especially significant in light of the fact that Francis v. Franklin did not resolve the issue of whether an erroneous charge "that shifts a burden of persuasion to the defendant on an essential element of an offense can ever be harmless." Francis, 471 U.S. at 325. This question was answered in the affirmative in this Court's decision in Rose v. Clark, a decision which the South Carolina Supreme Court was duty bound to apply to this case on remand from this Court. Because the South Carolina Supreme Court has made every effort to consider this matter in light of Francis v. Franklin, and its progeny, the South Carolina Supreme Court in no way has disregarded or violated the mandates of this Court as the Petitioner suggests.

2. The State Supreme Court conducted a proper harmless error analysis.

In conducting a harmless error analysis of a possible burden shifting presumption, the process is two-fold. First, the language of the charge itself must be examined to determine whether the specific language challenge is in error. If the specific language in question could reasonably be understood as

creating an improper presumption, then the language must be examined in light of the charge as a whole to determine whether, in context, the erroneous language is adequately explained or corrected. If the specific language is not erroneous and/or it is properly explained or corrected by other language in the charge, then the analysis ends and there is no reversible error. Francis v. Franklin, supra, and Cupp v. Naughton, 414 U.S. 141 (1973). However, if erroneous language does appear in the charge, which is not adequately explained or corrected, then the reviewing court must determine whether in light of the whole record "the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury." Rose, 478 U.S. at 580-581. As stated by a number of the Federal Courts of Appeal, "[a] Sandstrom error is harmless when the evidence of the element of the crime to which the instruction relates is so overwhelming or when that element is not in issue." Gates v. Zant, 863 F.2d 1492, 1502 (11th Cir. 1989); Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986); Burton v. Foltz, 810 F.2d 118 (6th Cir. 1987); Martin v. Foltz, 773 F.2d 711 (6th Cir. 1985); Boyen v. Kemp, 832 F.2d 546 (11th Cir. 1987); McKenzie v. Risley, 801 F.2d 1519 (9th Cir. 1986); Dickey v. Lewis, 859 F.2d 1365 (9th Cir. 1988); Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986); and Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986) affirmed in Burger v. Kemp, 483 U.S. 776 (1987).

Furthermore, it is interesting to note that the situation here is not unlike that in Burger v. Kemp, supra. In the Burger

case, this Court remanded the case for reconsideration in light of Francis v. Franklin. Pursuant to this Court's remand in Burger, the Eleventh Circuit Court of Appeals utilized a harmless error analysis and found that the challenged language was harmless beyond a reasonable doubt. This Court subsequently affirmed the decision of the Eleventh Circuit Court of Appeals. The South Carolina Supreme Court, like the Eleventh Circuit Court of Appeals, was not in error for analyzing an erroneous instruction under Rose v. Clark, when this Court had remanded for reconsideration pursuant to Francis v. Franklin.

In light of the afore-mentioned principles of law, this case presents a clear example of the harmlessness of an improper instruction on malice. First, as the South Carolina Supreme Court properly pointed out, the State sought to convict the Petitioner on the theory of accomplice liability.

> Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act, one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide.

Yates, 391 S.E.2d at 531. The facts pertaining to the Petitioner's complicity in the armed robbery and murder are overwhelming. The undisputed facts as indicated by Petitioner's own testimony indicate that he was plotting with Loftis and Davis for a period of time, as much as ten days prior to this incident, to commit various robberies and/or burglaries in the Greenville County area. Likewise, the evidence is equally overwhelming that the Petitioner plotted with Loftis and Davis on the day before

and the day of this incident to commit a robbery. That the Petitioner was a complete and total accomplice in these crimes cannot be disputed on the evidence in this record. See, Respondent's Statement of Facts, supra. Furthermore, it is undisputed but that the law in South Carolina is that in situations of accomplice liability involving murder, it is the intent of the killer which determines whether there is malice. Yates, 391 S.E.2d at 532.

The evidence is equally overwhelming regarding Henry Davis' malice at the time he stabbed Helen Wood to death. The only evidence in the record is that Henry Davis was a full accomplice and equal partner in the planning and commission of this armed robbery. Furthermore, the facts reveal that Henry Davis went into the establishment with Petitioner and actually took the money from Willie Wood. The undisputed facts in the record clearly indicate that Henry Davis got into a scuffle with Willie Wood inside the store and when Mr. Wood's mother, Helen Wood, got involved in the scuffle, she was stabbed by Davis. On the facts in this case, a juror would not have had to rely on an erroneous burden shifting presumption in order to conclusively find that Davis acted with malice. Davis' malice being, of course, the focal point for purposes of the South Carolina Law of Accomplice Liability. See, Respondent's Statement of Facts, supra.

In his Petition for Writ of Certiorari, the Petitioner argues much along the same lines as did the dissenters in the decision below. Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). Petitioner argues that his primary defense was

withdrawal and that "he had abandoned the robbery prior to Ms. Wood's arrival on the scene, that he had communicated this abandonment to his accomplice, that he never saw Ms. Wood at the scene, and that he was not legally responsible for her death." (Petition for Writ of Certiorari, p. 11). This assertion is totally unsupported by any facts in the record. The Petitioner simply never "withdrew" from the criminal enterprise. (Tr. p. 1210, line 16 - p. 1211, line 21). There is simply no evidence in the record that the Petitioner withdrew from the criminal enterprise. To be sure, he left the store, went into the parking lot and climbed into the passenger seat of his vehicle to wait on his accomplice, Henry Davis. However, merely leaving the scene of an armed robbery after completing the theft is not withdrawal from the criminal enterprise under South Carolina law. That Petitioner never intended to withdraw from the criminal enterprise is evident by his own testimony at trial to the effect that he left the store, entered the vehicle and waited on his co-defendant, Henry Davis. (Tr. p. 1136, line 15 - p. 1137, line 21; Tr. p. 1098, line 7 - p. 1099, line 6). Petitioner's own admission at trial that he waited in the getaway car outside the store for his accomplice, Henry Davis, is conclusive evidence that the Petitioner never "withdrew" from the criminal enterprise but was still willing to aide, assist and abet Mr. Davis even after the robbery had gone awry. Had Petitioner not testified in this manner and had there been some evidence of a genuine withdrawal, then Petitioner's arguments may have merit. However, in the absence of any evidence of a withdrawal, as that term is

understood in South Carolina Law, the malice instructions were totally harmless. Because no reasonable juror could have concluded that Petitioner was not aiding and abetting Davis in the course of a criminal enterprise, and because no reasonable juror could have concluded that Davis did not act with malice in killing Helen Wood, the errors here are harmless beyond a reasonable doubt. The judgment of the Supreme Court of South Carolina is proper and is in complete accordance with the decisions of this Court.

3. Because there is no confusion or uncertainty in the appropriate harmless error analysis to apply in cases such as this, this Court should not grant certiorari.

Petitioner argues that the appropriate harmless error analysis under Rose v. Clark, 478 U.S. 570 (1986), is not clear and, therefore, this Court should take review in order to clarify that standard. This Court's holding in Rose v. Clark regarding the appropriate standard of review is clear.

> In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. [citations omitted] In that event the erroneous instruction is simply superflous: The jury has found, in Winship's words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Rose, 478 U.S. at 580-581. That this is the appropriate mode of analysis is confirmed by the decisions of a number of Federal Courts of Appeal as cited above. Furthermore, this is clearly the mode of analysis which the South Carolina Supreme Court used in this case. Yates, 391 S.E.2d at 531.

Furthermore, even assuming that Rose v. Clark contains some kind of slight ambiguity in the form of harmless error analysis to be used, it is clear that the State Supreme Court applied the stricter standard in this case. In the Petition, the Petitioner argues as follows:

> Under one interpretation of Rose v. Clark, a reviewing court must determine, in order to deem a Sandstrom violation harmless, that the predicate facts which were actually proven beyond a reasonable doubt so conclusively establish the presumed fact that the jury may actually be said to have found "'every fact necessary' to establish every element of the offense beyond a reasonable doubt." [citation omitted] However, as Justice Scalia pointed out in Carella, "[e]lsewhere ... Rose says that usual harmless error analysis is applicable: 'when a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest of fairness has been satisfied and the judgment should be affirmed.' 478 U.S. at 579." [citation omitted]

(Petition for Certiorari, pp. 15-16). Clearly, under the express terms of the South Carolina Supreme Court's decision in this case, the stricter standard was applied. Also, as evidenced in Respondent's previous argument, the decisions in the Federal Courts of Appeal seem to reflect that it is the stricter standard which is being applied.

CONCLUSION

For the reasons set forth above, the writ should be denied.

[redacted]

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Chief [redacted] General

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ATTORNEYS FOR RESPONDENTS

By: [signature]

June 28, 1990

BEST AVAILABLE COPY

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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DALE ROBERT YATES,
Petitioner,

v.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections,
and the ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 29, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

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CHRONOLOGY OF RELEVANT EVENTS

DATE	PROCEEDINGS
February 13, 1981	Petitioner arrested and charged with the murder of Helen Wood
April 9, 1981	Petitioner indicted for murder, armed robbery, assault and battery with intent to kill, and conspiracy
April 27, 1981	Commencement of petitioner's trial in Greenville County Court of General Sessions.
April 30, 1981	Petitioner convicted as charged.
May 2, 1981	Petitioner sentenced to death.
December 22, 1982	Conviction and sentence of death affirmed by South Carolina Supreme Court, *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982).
July 6, 1983	Certiorari denied, *Yates v. South Carolina*, 462 U.S. 1124 (1983).
October 6, 1983	Application for post-conviction relief in the Greenville County Court of Common Pleas filed.
November 1, 1983	South Carolina Supreme Court decides *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), disapproving jury instructions which create mandatory rebuttable presumptions of malice.
August 14, 1984	Post-conviction relief denied by order of Hon. C. Victor Pyle, Resident Judge, Thirteenth Judicial Circuit.
January 14, 1985	Petition for writ of habeas corpus in the South Carolina Supreme Court challenging the constitutionality of the malice instructions given at his trial filed.

DATE	PROCEEDINGS
January 14, 1985	Petition for writ of certiorari in the South Carolina Supreme Court seeking review of the denial of post-conviction relief, and moves to consolidate petition for writ of certiorari with petition for writ of habeas corpus filed.
February 14, 1984	Respondents file return in South Carolina Supreme Court stating that they do not oppose consolidation of petitions "to resolve the apparent issues," but opposing relief.
May 1, 1985	Petitioner files supplemental memorandum of law in South Carolina Supreme Court calling court's attention to *Francis v. Franklin.*
May 23, 1985	Petitions for writ of certiorari and for habeas corpus summarily denied by South Carolina Supreme Court in unpublished order.
June 7, 1985	South Carolina Supreme Court grants 60-day stay of execution to permit filing of petition for writ of certiorari in United States Supreme Court.
August 9, 1985	Petition for certiorari filed in United States Supreme Court seeking review of South Carolina Supreme Court's denial of habeas corpus relief.
October 15, 1985	United States Supreme Court grants petition for writ of certiorari, vacates judgment, and remands case to the South Carolina Supreme Court for further consideration in light of *Francis v. Franklin,* 471 U.S. 307 (1985); *Yates v. Aiken,* 474 U.S. 896 (1985).

DATE	PROCEEDINGS
March 26, 1986	Oral argument before South Carolina Supreme Court on remand.
September 29, 1986	Opinion of South Carolina Supreme Court denying habeas corpus petition, *Yates v. Aiken,* 290 S.C. 232, 349 S.E.2d 84 (1986).
December 19, 1986	Petition for writ of certiorari filed in United States Supreme Court.
March 30, 1987	Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted.
January 12, 1988	United States Supreme Court reverses judgment of South Carolina Supreme Court and remands with instructions "to grant the relief that federal law requires." *Yates v. Aiken,* 484 U.S. 211 (1988).
February 6, 1989	South Carolina Supreme Court denies relief on remand, with two justices dissenting. *Yates v. Aiken,* —— S.C. ——, 391 S.E.2d 530 (1989).
January 29, 1990	South Carolina Supreme Court denies rehearing, issues amended majority opinion in *Yates v. Aiken,* —— S.C. ——, 391 S.E.2d 530 (1989).

GREENVILLE COUNTY COURT
OF GENERAL SESSIONS

No. _____

STATE OF SOUTH CAROLINA

v.

DALE ROBERT YATES

EXCERPT FROM PROSECUTOR'S OPENING STATEMENT TO THE JURY

• • • •

[771] Under our system of justice, and I certainly support that, everybody is presumed to be innocent until proven guilty beyond a reasonable doubt. That is the phrase I want to mention to you now and it is something that you will take back with you as a legal yardstick, if you will, to assist you in evaluating the facts of this case in arriving at a verdict: guilty or not guilty. Reasonable doubt. What is reasonable doubt? I say, at the beginning, if you have a reasonable doubt, Madam Foreman and ladies and gentlemen, at the conclusion of this first part of this trial, as to the guilt of this Defendant, then you should find him not guilty. If you have a reasonable doubt as to his guilt, you should find him not guilty, for that would be justice and that is what we are seeking. If you do not have a [772] reasonable doubt as to his guilt, then you should find him guilty, for that would be justice and that is what we are seeking.

Now, what is this term "reasonable doubt"? Let me tell you first of all what it is not. It is not just a doubt; it is a reasonable doubt. The law recognizes that about

every proposition in life, unless you are an eyewitness to it, you are going to have some doubt, in the back recesses of your mind, about everything, unless you were personally involved in it. Of course, if you are personally involved in it, you couldn't be a juror. So, if you have just a doubt about his guilt, then you must find him guilty. If you have just a doubt. But what you must have in your mind, as a collective body, is a reasonable doubt, known to the law and defined by our supreme court, as I best understand it, a substantial doubt. Reasonable doubt means substantial doubt.

Sometimes you hear jurors say, "Well, I believe you've —the law says you must find people guilty beyond every shadow of a doubt," or words like that; well, that is not the law, and Judge Harris will tell you. Of course, you must follow the law, and I know you will.

Bear in mind, that is the burden of proof that I carry. I must convince you, through the evidence and testimony, beyond a substantial doubt. That is, you must go [773] back and say, "I have no substantial doubt about his guilt. I don't have a substantial doubt about it." If you do that, then the State would have met the burden of proof. If you say I've got a substantial doubt, then you must find him not guilty.

• • • •

EXCERPT FROM DEFENSE COUNSEL'S OPENING STATEMENT TO THE JURY

• • • •

When I say "beyond a reasonable doubt" I mean exactly the same thing in the law as you would in the everyday English language and that is a doubt for which you have a real reason, not a fanciful doubt, not a whimsical doubt, because you could doubt any proposition if you wanted to.

• • • •

So, that is the standard of proof which the State must meet. I tell you to be aware that it is the State's burden and that is the degree of proof by which the State must convince you of the existence of the elements of this charge.

• • • •

EXCERPT FROM TESTIMONY OF DAVID EUGENE LOFTIS

• • • •

[816] Q. On February 12th, there at the Mauldin Gardens Apartments, when you and Davis and Yates were together, is that when you had the conversation?

A. Yes, sir.

Q. What time of day or night was it, do you remember?

A. I am not sure of the time.

Q. Were y'all doing anything in particular, other than sitting around talking?

A. Just drinking a little bit and smoking a little reef.

Q. Now, tell us about the conversation that you three had.

A. Henry had mentioned something about robbing a place—

Q. The three of your there?

A. Right, and he said that he had a knife and I told him that, you know, a knife wouldn't do it. You know, that nine times out of ten, the places you go in have a gun, and you'd get your ass shot as soon as you start to leave. So, Dale had mentioned that his brother had a gun and that he would give it to me faster than he would give it to himself.

[817] Q. Who mentioned that his brother had a gun?

A. Dale Yates.

Q. The Defendant?

A. Yes, sir.

Q. Did you know his brother?

A. Yes, sir.

Q. What is his brother's name?

A. Alan Yates.

Q. Dale mentioned to you that his brother had a gun?

A. Yes, sir.

Q. What role were you suppose to play in getting the gun?

A. I told Alan Yates that I was getting—that we were going on the other side of Greenville to buy some dope, and I wanted the gun for protection. So, he gave me the gun.

Q. Now, where did Alan Yates live?

A. He lives right in front of his mother. I believe that is off of Prescott Avenue in Mauldin.

Q. You know how to get to it?

A. Yes, sir.

Q. Did you go over there that night on February 12th, to Alan Yates' place?

A. Yes, sir.

Q. How did you get over there?

A. I rode with Henry and Dale.

[818] Q. What type of car did you ride in?

A. In Henry's buick.

Q. The blue buick that is shown there in the photographs that you identified?

A. Yes, sir.

Q. Did the Defendant, Yates, ride with you?

A. Yes, sir.

Q. Tell us what happened when you got over there to the Defendant's brother's place.

A. When we drove up, Alan Yates was either coming out of his mother's house or was outside, I am not sure which one it was; but he walked up to the car and I explained to him I needed to borrow the gun because I had to go cop some dope.

Q. When you say "cop some dope" that means go buy some dope?

A. Yes, sir, and I needed it for my own protection, because I didn't like where I was going to buy the dope. So, we went inside the house—me and Dale went inside the house—Alan went back and got the gun and brought

it to me. And I believe we smoked a couple of joints with Alan and we left and went back to the apartment.

Q. Does this look like the pistol that Alan Yates gave you in the presence of his brother, Dale Yates?

A. Yes, sir.

[819] Q. Was it enclosed in anything like a holster or a package or anything else when you received it?

A. Yes, sir, a black holster.

Q. Does this look like the holster?

A. Yes, sir.

Q. Now, Mr. Loftis, after you got this pistol from the Defendant's brother there at his house—By the way, was Mr. Yates, the Defendant, was he with you there in the house when you received this pistol?

A. Yes, sir.

SOLICITOR WILKINS: I would like to mark this for identification, at this time, Your Honor.

(State's Exhibit No. 10 marked for identification.)

Q. How about bullets? Did the pistol have any bullets in it?

A. Alan told me that it was loaded and I didn't check. I just assumed that it was and left it in the holster.

Q. Did you take it back to the car?

THE COURT: Speak up, Mr. Loftis, nobody can hear you?

A. I was told that the gun was loaded, and that I assumed it was and I didn't check and I left it in the holster, and I put it in my belt and went back to the car and, then, we left.

Q. Did the Defendant, Yates, go back to the car with you?

[820] A. Yes, sir.

Q. Was Henry Davis still waiting in the car for you?

A. Yes, sir.

Q. Where did you three, then, go when you left?

A. We went to Henry Davis' apartment.

Q. Back over there to the Mauldin Gardens?

A. Yes, sir.

Q. Did you have the pistol with you at that time?

A. Yes, sir.

Q. Did you see any other weapons?

A. No, sir, not at that time.

Q. Did you leave the Mauldin Gardens or Henry Davis' apartment that night?

A. I believe we went to pick up his wife from work. I believe she worked that night. I am not quite sure.

Q. Other than, perhaps, that, did you go out anywhere in the community in the county that night?

A. No, sir, not nowhere except ride around to get the gun and in that area [sic].

Q. Where did Henry Davis spend the night that night, the night of February 12th, going into the 13th of February?

A. In his own bedroom at his apartment with his wife.

Q. Where did you stay?

A. I slept on the floor, in front of the T.V., in the living room.

[821] Q. At Henry Davis' apartment?

A. Yes, sir.

Q. How about Dale Yates, where did he stay?

A. He slept on the couch in the living room.

Q. All three of you slept in the same apartment that night?

A. Yes, sir.

Q. What happened the next morning?

A. The next morning, we got up and eat breakfast and, then, we left and just went riding around. I can't remember what Henry told his wife we were going to do, but we left and we rode around just looking at places to rob.

Q. Who was driving the car?

A. Henry Davis.

Q. Were you riding in the front seat or the back seat?

A. Right front seat.

Q. How about the Defendant Yates, where was he?

A. Back seat.

Q. As you rode around looking for places to rob, where did you ride to?

A. Down Log Shoals Road, over—I don't know the name of the roads, they are over toward Donaldson Center and over in that area. I don't know the name of those roads back over in there—just, you know, little stores that Henry knew and Dale knew and we just, you know, casing them [822] out.

Q. How would you case them out?

A. Ride by and look and see if they was [sic] many people there or if it looked like there wasn't anybody there at all or whatever.

• • • •

Q. Mr. Loftis, as you rode around casing out some stores down around Donaldson Center and Log Shoals Road, did you ever point out any stores? Did you know of any stores or identify any stores, yourself?

A. No, sir.

Q. Who identified the stores or decided which stores y'all would go ride and case out?

[823] A. Mr. Yates and Mr. Davis.

Q. Did you have any conversation about who was suppose to do what, whenever you found the right store?

A. It was talked about and, I think, it was, more or less, I decided that I'd go into the store and do the armed robbery.

Q. What was Mr. Davis going to do?

A. He was going to drive the car.

Q. What was Mr. Yates going to do?

A. He was going to stay in the car and just watch, you know, my backup or whatever.

Q. Yates was going to be the backup?

A. Yes, sir.

Q. As you pulled up to any of the particular stores, did you have any conversation about this particular store or that particular store?

A. They would say, "what about this one?" or something like that, and I would say "no" or "I don't like the way it looks." I'd make up an excuse.

Q. Made up an excuse about—What kind of an excuse are you talking about?

A. I didn't really want to do it. I don't know, but I'd just make up an excuse not to do—to rob the place, and just to keep going on and, hopefully, just kept riding on from place to place.

[824] Q. This was all during the morning hours?

A. Yes, sir.

Q. At any time during that morning, did you tell Mr. Davis and Mr. Yates that you weren't going to do it?

A. I don't know if it was so much in that words or whatever. We had talked about if, you know, if you rob a place, the time you could get out of it; and if somebody had got killed in the process. I was worried about that.

Q. What are you talking about?

A. You know, talking about you can get the death sentence for killing somebody while in the process of a armed robbery.

• • • •

[825] Q. Did Yates or Davis ever get out of the car and go in any store?

A. No, sir, not that I remember.

Q. Did you talk about it or did they talk about it, about the time you could get for armed robbery?

A. I did most of the talking about it, yes, sir.

Q. And you told them "you can get a lot of time for armed robbery"?

A. Yes, sir.

Q. Who made the statement that if somebody gets killed, you can get the electric chair?

A. I did.

Q. Did you tell Yates and Davis that?

A. Yes, sir.

Q. Any time, during that morning, did you finally just quit riding around and go anywhere?

A. Yes, sir, somehow we ended up on 291. So, we went on up to a place called "Why Nots" and—

Q. What is "Why Nots"?

A. It's a little pool room and arcade deal. It is up on Wade Hampton Boulevard.

Q. Had you ever been there before?

A. Yes, sir.

Q. How many occasions prior to that?

A. Several. I can't count them.

[826] Q. About what time was it when you got there to Why Nots?

A. Before dinner. I just don't remember what time.

Q. Do you know the man that runs Why Nots?

A. Yes, sir.

Q. Do you know him by sight?

A. Yes, sir.

Q. What do you call him?

A. "Bou."

Q. "Bou"?

A. Yes, sir.

Q. Bou, stand up, please.

Do you know this man right here, Mr. Loftis?

A. Yes, sir.

Q. And you know him as "Bou"?

A. Yes, sir.

Q. And does he run the Why Nots?

A. Yes, sir.

Q. Was he running it on February 13th, around dinner time, when you went in his place?

A. Yes, sir.

Q. What did you and Mr. Davis and Mr. Yates do there at the Why Nots arcade?

A. They have several machines there, you know, and we played some of the machines and, you know, just hung around down there for a while. Nothing in particular. Shot a [827] couple games of pool, I believe.

Q. By the way, where was that pistol, at this time?

A. It was in the car, under the front seat.

Q. Did you ever leave Why Nots, that day?

A. Yes, sir.

Q. About what time was that?

A. I am not sure of the time. It was a little bit after dinner.

Q. Where did you go, then?

A. We went to Haywood Mall. We went back to Mauldin to the apartment because I had to make a phone call to my girlfriend, and called her; then, we left and went to Haywood Mall.

Q. For what purpose did you go to Haywood Mall?

A. To see my girlfriend.

Q. Did she work at Haywood Mall?

A. Yes, sir.

Q. What is her name?

A. Kim Johnson.

Q. Did you see Kim Johnson, your girlfriend, at Haywood Mall?

A. Yes, sir.

Q. Where does she work?

A. The Ormond shop at Haywood Mall.

Q. What happened at Haywood Mall?

[828] A. We pulled up at the back entrance where I always come when I go to see Kim. I told them to wait on me a minute. I went inside, into the Mall, and was standing there talking to Kim where she works at. Dale Yates came in and he called me aside. I went over to him and he said, "We're going somewhere, we will be back in a little bit." He said, "be back at 5:00." I said, "Okay." I went back over there and was talking to my girlfriend. Mr. Yates left.

Q. Did you stay there at the Mall that afternoon after Mr. Yates left?

A. Yes, sir.

Q. Did Mr. Yates and Mr. Davis ever come back to pick you up?

A. No, sir.

Q. When did you learn of the incident at the Wood Store in Tigerville?

A. It was about 8:30 that night.

Q. Do you know about what time it was, in the afternoon, when Mr. Yates and Mr. Davis left your company there at Haywood Mall?

A. I would say—I can't remember—a few minutes before 3 or a few minutes after 3, because I remember my girlfriend went to work at 3. I had just got there and she had just got there. She had just clocked in when I walked up to her and started talking to her. No later than 3:00.

[829] Q. Did you see Mr. Davis or Mr. Yates anymore that day?

A. No, sir.

Q. Where was the pistol when you last saw it?

A. It was under the front seat in the car.

Q. The passenger's side or the driver's side?

A. The passenger's side of the front seat.

Q. Mr. Loftis, when you were first contacted by the police, do you remember talking to Sgt. Hitchins?

A. Yes, sir.

Q. When you talked to Sgt. Hitchins, did you tell him everything you knew about this case?

A. No, sir.

Q. What did you tell him?

A. I told him that I was drunk the night before; that I heard no conversation about it—

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[833] Q. Why didn't you tell Sgt. Hitchins about what you knew about this case when he first talked to you?

A. I was just scared I would get involved into the case and be charged.

Q. Have you ever seen a knife like this before?

A. Yes, sir.

Q. Where have you seen it?

A. It belonged to Henry Davis.

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Q. Back to the date of February 12th, you testified that you had some discussions?

A. Yes, sir.

Q. What was your state of mind, your mental condition—your condition generally?

A. I don't know how to put that in words.

Q. Were you high?

[834] A. Yes.

Q. You had been drinking?

A. Yes, sir.

Q. David, have you been charged with any crime in this case?

A. No, sir.

Q. Have you been charged with conspiracy?

A. No, sir.

Q. You haven't been charged with anything relating to this case?

A. No, sir.

Q. David, whose car was used in this incident?

A. In the trial, now?

Q. Yes.

A. It was Henry's, I believe.

Q. Whose knife?

A. I don't know.

Q. You don't know who had the knife?

A. The knife that they showed me?

Q. The knife that you testified about. Whose knife was that?

A. That was Henry's.

Q. Who was the driver of the car when you rode around?

A. Henry.

Q. Where was the gun the last time you saw it?

[835] A. Under the front seat—Well, I'd put it under the front seat on the passenger's side, in the front.

Q. Who was in the front seat?
A. Henry.
Q. And, who else?
A. Dale.
Q. Who was driving the car?
A. Henry.
Q. Thank you very much.

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EXCERPT FROM TESTIMONY OF WILLIE WOOD

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[911] Q. State your name, please.
A. Willie Wood.
Q. Mr. Wood, please speak up, because it is very important [912] that this jury hear what you've got to say.
Mr. Wood, how old are you?
A. 46.
Q. Where were you born and raised?
A. Tigerville.
Q. You've been working in Tigerville since you became an adult?
A. Right.
Q. What type of work do you do in Tigerville?
A. Run a general store.
Q. Is that general store called Wood Grocery—
A. T. P. Wood's Store.
Q. Your daddy testified earlier, Pralo Wood, is that correct?
A. Yes, sir.
Q. This State's Exhibit No. 3, is that a picture of the store that you have been running?
A. Yes, sir.
Q. How many years have you been running this store?
A. Well, I've worked in it ever since I was in high school but have run in fully by myself for the last 10 or 11 years.
Q. Your daddy kind of turned the store over to you?
A. Yeah.

Q. In your store, Mr. Wood, was part of it, on the side, set aside as a post office?
[913] A. On the left-hand side, as you go in the door.
Q. And it was actually a post office, wasn't it?
A. Post office. It has its own door.
Q. Who was the postmistress?
A. Helen R. Wood.
Q. Was that your mother?
A. My mother.
Q. And your mother had been postmistress up there for about 47 years, hadn't she?
A. Yes, sir.
Q. How old was your mother when she was killed?
A. 68 or 9, somewhere along in there.
Q. You and your mother worked together everyday in that store?
A. Yes, sir.
Q. Willie, on February 13th, of this year, were you working there in the store?
A. Yes, sir.
Q. Will you tell the jury and the Court what happened up there sometime around 4:00 or a few minutes after 4 on that Friday afternoon?
A. Well, I was standing, leaning up on the counter, next to the cash register, on the right-hand side, on my elbow. Two guys walked to the front door and come on in.
Q. By the way, was anyone else in the store, at that time, [914] besides you?
A. Mother was back in the post office, out of sight, because you couldn't see her. They walked on by the cash register, the first one did. I thought he was going to the drink box. I didn't even pay him any attention, and the next one stopped in front of me, and I looked him in the eye and was fixing to say, "What for you?" and he says, "Give me your money." I looked down and he had a gun. I said, "What money?" The guy on the left of the cash register hollered out, "I said, give me all of your money." I stepped down, to my left and looked at him. He had a

knife drawn like this, about 5½ to 6-inch knife. So, I opened the cash register, give him all the $20s. He said, "I said, give it all to me." I give him the $10s, laid them in his left hand. I said, "Do you want the $1s and the change?" He said, "No, I want you to bend over the counter." I looked at him and the knife and said, "No."

Q. When you handed this man—You were standing at the cash register?

A. Right.

Q. And the man with the knife was then to your left, across the counter from you?

A. Right, the check-out counter, on the left.

Q. And the man with the gun was to your right, across [915] the counter?

A. Right.

Q. You say you handed the man with the knife the money?

A. Yes, put it in his left hand, the $20s, the $10s, and a few $1s. I didn't give him no $5s.

Q. About how much money did you give him?

A. Roughly $3,000.

Q. Where was his knife, at this time?

A. In his right hand, in a stabbing motion.

Q. When you laid the money in his hand, could you just stack it up in his hand?

A. I just laid it over the top of his left hand.

Q. You said, "Do you want the change," or words to that effect, is that what you said?

A. I said, "Do you want all of the $1s and the change?" He said, "No, I want you to bend over this counter." I looked at him and looked at the knife and said "no," and stepped down, stepped down to kind of at the end of the meat box. Then, the guy on the right, with the glasses, he stepped down and pointed the gun at me and fired. I thowed [sic] up like this (indicating). I felt a sting on my chest. So, I looked back to see where the other guy was with a knife and he was standing at the end of the meat box, and he started around the meat box, down the

counter, on behind me, and I started out the front of the [916] counter, so I could get face to face with him again, trying to get my gun out.

Q. You had a gun on your side?

A. Right.

Q. You normally carried a pistol on your side when you were working?

A. Sometimes, sometimes not.

Q. What were you wearing that day?

A. I was wearing a London Fog short jacket, and it was new and kind of stiff, and it zipped up, and hard to get to, and, then, my hand was hurt to, see, and I was trying to pull up my coat and get it out.

Q. Did you have a shirt on under your jacket?

A. Had a shirt, a tee-shirt.

Q. When the man with the gun fired, did you see him before he fired?

A. I seen him aim and shoot and I felt a sting. I looked back—I didn't look at him no more—I looked back were the guy with the knife was. He was coming around the counter. I started toward the front of the counter, but when the shot was fired, Mama run out of the post office door. I heard the door slam. She hollered something. I don't know what, but he was on my back when we ended at the end of the counter before we go out in the aisle; and it looked like she reached her [917] left arm around and grabbed him. So, all three of us stumbled around the counter, out in the aisle.

Q. Out there near the front door?

A. Near the front door, in front of the ice cream box. She fell on her hands and knees. Well, I had my gun in my hand, then, and holding my hand up like this (indicating) and I started shooting and just pushing him on back until he couldn't go no further against the shoe boxes, there. The last shot I fired, he hollered and hit the floor and the knife fell out of his hand.

Q. What type of pistol did you have?

A. I had a Charter Arms, .38 special, 2 inch.

Q. How many bullets does it hold?
A. Five.
Q. Did you fire all five bullets?
A. All five.
Q. After you shot the man with the knife, what did you do?
A. I looked over at Mama and she was down on her hands and knees. She said, "I believe I am dying." I could see blood spurting out of the heart. I didn't say nothing. I went to the telephone, dialed "0" and told the operator to give me EMS and sheriff's office.
Q. Willie, is this the London Fog jacket that you had on that day?
[918] A. Yes, sir.
Q. Is this the shirt that you had on?
A. Yes, sir.
Q. And your undershirt?
A. Yes, sir.
SOLICITOR WILKINS: We offer these into evidence, at this time, Your Honor.
THE COURT: Any objection?
SOLICITOR WILKINS: They say no objection.

(State's Exhibit No. 12 received in evidence.)

A. I dialed the operator and told her to give me EMS and the sheriff's office, there has been a murder and a robbery. While I was on the phone, Dr. Meredith run to the end of the counter. I told him what had happened. He said there was a boy getting in an automobile out here, a certain color and everything. I said, "I didn't see no car." I said, "You come and get on the phone and talk to them." I went back around to see—Mama had done laid down nearly on her back. I looked at her and she was dead. I looked at him and he was dead.
Q. Mr. Wood, just before the man with the gun fired a shot at you, you threw up your hands a while ago. Would you show me how you threw your hands up.
A. (Witness complies.) The bullet went in there and

[919] come out here and hit my chest. Tore all the hide off my chest, but didn't go inside. The bullet fell in my pocket.
Q. Is that the bullet that you gave to your brother, Bobby?
A. Yes, sir.
Q. By the way, when you held your hands up, did you have your palm facing the pistol or the back of your hand facing the pistol?
A. Had it like this.
Q. Is that a picture of your palm of your left hand showing where the bullet entered?
A. Yes, sir.
Q. Is this a picture of your left hand showing where the bullet exited the back of your hand?
A. Yes, sir.
Q. And does this third picture show where the bullet hit you in the chest?
A. Yes, sir.
SOLICITOR WILKINS: I offer these into evidence, Your Honor.
MR. HENRY: Without objection, Your Honor.

(State's Exhibits No. 13, 14, and 15 received in evidence.)

Q. When this man was facing you with that pistol, Willie, and he fired, can you tell us exactly how many times he [920] fired?
A. Once or twice.
Q. You were hit once?
A. Right.
Q. Willie, is this your pistol that was on your hip at the time this incident occurred?
A. Yes, sir.
Q. Is that the pistol you fired five times at the man with the knife?
A. Yes, sir.

Q. Did you unload your pistol as you fired all the bullets it would hold, that is, five?

A. Yeah, I left the shells in it. I didn't take them out. I turned it over to the law officers when they got there.

SOLICITOR WILKINS: We would offer this into evidence at this time.

(State's Exhibit No. 16 received in evidence.)

Q. Were there any other pistols in the store of yours, Willie?

A. There was one, when I went back around, after I called EMS and the sheriff's office, I went back around and I noticed a gun laying in front of the ice cream box. At that time, I didn't know how it got there or whose it [921] was or nothing.

Q. Where was that gun normally kept there in the store?

A. Around the cash register.

Q. Right there, back behind the cash register?

A. Yes, sir.

Q. Was that gun fully loaded?

A. Yes, sir.

Q. Had it been fired?

A. No, sir.

Q. Is this that pistol, Willie?

A. Yes, .32 Colt.

SOLICITOR WILKINS: We'd offer this into evidence.

MR. MAULDIN: Your Honor, if I understand the sequence at this point. This gun was laying out in the room and had not been fired, and Mr. Wood does not know how it got there or anything, but it does belong to him?

SOLICITOR WILKINS: That is what he said.

MR. MAULDIN: If I could just simply request, if there is going to be any tying up of that, necessarily, I mean—

SOLICITOR WILKINS: There's—As a matter of fact, I will withdraw it. This, actually, has absolutely

nothing to do with this incident, but it is just a piece of evidence that happened to be found there.

THE COURT: All right, sir.

[922] MR. MAULDIN: Of course, we are not, necessarily, objecting to it, and we may ask Mr. Wood some questions about it; and, of course, Mr. Wilkins could offer it or not, but we are just trying to follow the situation.

THE COURT: All right, sir.

Q. By the way, Willie, after the police got there and your mother was taken away, did you and some of the officers and your father find a bullet hole in the back of your store?

A. Yes, sir, there was one found above—the back window, above a "Keep Out" sign, where the signs that I sell, it says, "Keep Out, No Trespassing" and all that, and there is a fresh bullet hole up above the "Keep Out" sign. You could see all the way through it, daylight, if you stand.

Q. Willie, I show you what has been marked State's Exhibit No. 5. Can you identify the man in that photograph?

A. Mr. Davis.

Q. You said that is Mr. Davis?

A. Yes, sir.

Q. Is this the man with the knife?

A. Yes, sir.

Q. Can you identify the man with the pistol, Willie?

A. Yes, sir.

Over yonder with the glasses, on the end.

Q. Ask the Defendant to please rise.

[923] (Defendant stands.)

Q. The man standing there, Willie, is that him?

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[924] Q. Go ahead and show us—just draw on there or trace on there, without using any mark, the direction that these two men took, as they entered your store.

A. The first one come down through here by the cash register. I didn't even watch where he went. The next one stopped on this side, facing me.

Q. Who was that? Was that Davis or Yates?

A. Yates.

Q. Put a "Y" there where Yates was standing when you first saw him. (Witness complies.) Now, where was Yates standing when he said, "Give me your money"?

A. Facing me. I looked him in the eye and started to ask him what for you? About that time, he said, "Give me your [925] money." I looked down and he had a gun pointed like this.

Q. And he was standing across the counter from you?

A. Right, on this side.

Q. Then, what happened next?

A. I said, "What money?" And, then, this guy, on this side over here, hollered out and said, "I said, give me all your money." Well, I stepped down to where I could see him, on this side of the cash register, and he was standing there with a knife, like this (indicating). So, I opened the cash register and handed it out to him in his left hand.

Q. Put a "D" there where Davis was standing there with the knife, when you handed him the money. (Witness complies.) Now, you are standing behind the cash register. How many times did you hand him money—you stacked it up in his hand, I believe you said?

A. Well, I know two times, but I must have given him three, because I give him some $1s, but I didn't give him no $5s. And I asked him if he wanted the silver and the $1s, and he said, "No, bend over the counter."

Q. When he said, "Bend over the counter," was he still standing there with a knife in his hand?

A. Right.

Q. What did you then do, Willie?

A. Well, I looked at him and I looked at the counter, and [926] I said, "No," and stepped back down here to the corner of this meat box.

Q. Draw a circle and put a "W" in it at approximately where you were standing there around the meat box. (Witness complies.) Now, what did you see Davis then do as you stepped back down the counter?

A. Davis come on down here, nearly to the end of the meat box, say, three-fourths of it.

Q. Put another "D" there. (Witness complies.) Now, what did you see the Defendant, Mr. Yates, do at this time, Willie?

A. Well, when I didn't bend over, he went back here; Yates stepped over here where he could see me, along in here.

Q. Put a "Y" down here in that circle. (Witness complies.) Now, you have a circle there with "Y-2" in it, Willie, is that the position Yates was in when he fired at you?

A. Yes.

Q. Were you facing him?

A. Yes, I was watching him.

Q. Is that when you threw up your hands in defense?

A. When he shot it, and I felt a sting on my chest.

Q. Now, after Yates shot—and you say he either shot once or twice, you are not sure how many times—what did you, then, do, Willie?

[927] A. I looked down here to see where this other guy was, Davis. When I didn't fall, he started around the counter. I started moving up this way fast, trying to get my gun. I come out up here and Mama come around this way and met him right there. We all met right here.

Q. Did Mr. Davis ever catch you before you got to the front of the store?

A. I'd say he was right on my back about the time I come out in the aisle, because I was on this side and he was in the middle and Mama was on this side.

Q. During the time you moved from the "W-2" position, where you were shot, to the front of the store, did Mr. Davis ever have any contact with you, ever touch you?

A. Not as I know of, except we got in contact up here.

Q. Then, what happened when you got, at this point—if you will mark here an "H" for your mother and a "W" for you, and a "D"—and I'll put a "3" by the "D" for Davis. That is where all three of you came together?

A. Right.

Q. All right, explain to us what happened then?

A. Well, one of us bumped this showcase over, off about that much off the counter, because it is narrow. We all stumbled around through here, scrambling and going on. She fell on her hands and knees, right here, and she fell. I had my gun out and I could see I could get to him, then. [928] She was out of the way. I started shooting and I kept backing him, I kept just going on against him shooting him and he still held the knife in a stabbing motion till the last shot. He never did say a word to the last shot. He hollered and fell on the floor and the knife fell, right here, on the floor.

Q. Did he hit the floor about where he is drawn there in the diagram?

A. Yes.

Q. When you fired the first shot, where were you approximately standing?

A. After she went down on her knees, I started shooting, because I couldn't do nothing for her on that side.

Q. Where was Davis standing?

A. Davis come on around—he was standing—I don't know where he—He was standing along in there when I started shooting the first shot, but I backed him to back over here till he couldn't go no further. I just kept shooting and walking and shooting, at the same time, and holding my hand up like this.

Q. Did he have that knife still in his hand?

A. He had it drawed [sic] that way when he fell.

Q. During that period of time while you were shooting, were you holding the pistol in your right hand or your left hand?

[929] A. Right.

Q. What were you doing with your injured hand?

A. To the best I know, I was guarding myself.

Q. Were you ever cut on the inside of your hand?

A. Yes, these three fingers; these main liters [sic] on these three fingers is cut. They were sewed back and straighten . . . .

COURT REPORTER: Would you speak up, please.

Q. Willie, after Davis fell, as you backed him along the front of the store, what did you do, then?

A. You mean after he fell?

Q. After Davis fell.

A. I looked at Mama and she was down on her hands and knees over here and I could stand and see the blood spurting out of her heart.

Q. What was she wearing?

A. She had on some slacks, cape, and what I call snow shoes, fur boots. When I looked at her and seen she was bleeding, I looked down at my hand and it was pouring blood. I know'd nothing I could do, so I went and dialed "0" on the phone and told the operator to give me EMS and the sheriff's office at once.

Q. After Yates fired at you, Willie, as you have already indicated to the jury, I believe you testified you, then, turned your attention to Davis?

[930] A. Yes, I didn't look at Yates.

Q. Did you see what Yates did after that?

A. No, sir.

Q. Have a seat. (Witness returns to stand.)

The area marked "W-2" on the diagram, the place where you were shot, after you left that area, as you

moved up the counter with Davis coming behind you, did you ever go back to that area where you were shot?

A. No, I stopped, first, at the phone. It was a little bit passed the phone where I got shot. I stopped at the phone when I went back. The phone is closer, hanging on a wall on a post.

Q. In fact, the phone is almost right behind the cash register, just about, isn't it?

A. Down just a little bit.

Q. When Davis told you to lean or bend over that counter, how was he holding that knife?

A. Stabbing motion, like this (indicating).

Q. How far away was he?

A. Well, he was standing up against the counter, because I was laying the money in his hand.

Q. Y'all were within two or three feet of each other?

A. Well, that counter is about as wide as the top of that counter, right there. He's leaning up against it on the other side.

[931] Q. Facing each other?

A. Right.

Q. When you moved down passed, to the meat case, you looked up and you saw Yates pointing the pistol at you, how was he holding the pistol?

A. Like that (indicating), just pointing it at me.

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[936] Q. When, what you have noted here as Mr. Davis' first position "D-1", is that correct?

A. Yes, that is when I give him the money, handed him the money in his hand, right here.

Q. Your attention was focused on him at that point?

A. Right.

Q. At what point did you change your attention and where were you exactly when that attention changed?

A. Well, I stepped down here, when I told him no.

Q. Did you also step back, as you did that?

A. I stepped back and down.

Q. Could you show me your approximate route?

A. Here is the cash register. I had it open, handing him the money across this counter. He told me to bend over the counter and I stepped down about along in here.

Q. Did you move back, first, and then down or did you—

A. I was angled. I wouldn't swear which way, but I know—I went up against the counter. I went back.

Q. When you got back there, your spot, were you . . . were you against this side?

A. In other words, the angle of the bullet—I wasn't behind the meat case—aiming the bullet, it didn't touch [937] the meat case, it went over. He was shooting—he was standing up here at what I call the candy rack, on this side, Yates was.

Q. You were closer to the meat case than you were to the shelves, right?

A. I was about in the middle of the aisle.

Q. So, where you have the "W", you say you were in the middle of that aisle?

A. Yes, right in there.

Q. Were you aware, at that point, that Mr. Davis had moved down in front of you?

A. Not at that point, but after he shot me and I looked to see where he had went, and he was here and I never did look at Yates no more. I watched him because he come around the counter and started after me, and I know'd he was going to stab me in the back.

Q. From the time that you turned your attention from Mr. Davis and moved back away from him, in the middle of this aisle, at the time of the firing of shots, how much time had passed, approximately?

A. Just a few seconds. The whole thing wasn't over two minutes long, from the time they come in the door, I don't guess.

Q. After the shot or shots—you said you weren't sure if there one or two, right?

[938] A. Right.

Q. —were fired, then you turned your attention, again, to Davis?

A. Yes, to see what he was doing. He was still standing back there with a knife. He started around the counter when he seen I didn't fall.

Q. From the time you felt the pain in your chest or burning, how long was it before you knew where Davis was?

A. Just as soon as I was hit, I looked to see where he was, and then I come back down toward the cash register, because I figured he was going to keep shooting. I wanted to get out of his line of fire, behind the cash register, and he would have to move one way or the other.

Q. So, Davis, by that time, right after the shot hit you, was already around the corner?

A. No, he wasn't around the corner when I got shot. He was standing down here where he was shooting, and he seen I didn't fall and then he come around the counter.

Q. That was immediately after the shot hit you?

A. Right. I looked at him and he started walking around—running like around this way and down that way.

Q. As soon as the shot hit you, do you know where he was going?

A. Did I know where Davis was going?

Q. Right.

[939] A. No, but I watched to see what he was going to do.

Q. When you came down the aisle?

A. Right.

Q. Pass the cash register?

A. Right. The drawer was left open.

Q. The check-out counter, the cash register, and back down the candy case?

A. Yes, all of us met right here.

Q. After the shot hit you, you didn't pay any more attention to where our client was, Mr. Yates?

A. Didn't watch him anymore.

(Witness returns to stand.)

Q. I think it might be better if you come down for my last question.

(Witness returns to front of jury.)

Q. One last thing for clarification. This circle that you have labeled as "Y-2", is that the position you saw him in when he—

COURT REPORTER: Would you speak up, please.

Q. —fired the shots?

A. Yes.

Q. (Repeat.) This circle that you have labeled as "Y-2", is that the position you saw Mr. Yates in when he fired the shots?

A. Yes.

[940] Q. Is that the last place you saw him?

A. Yes.

REDIRECT EXAMINATION BY SOLICITOR WILKINS:

Q. Mr. Wood, when the Defendant fired at you, was there anything between you and Mr. Yates to obstruct your vision?

A. No, sir.

Q. Did you look at him, as I am looking at you?

A. Yes, sir.

Q. Did you see him holding the pistol pointed at you?

A. Yes, sir.

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EXCERPT FROM TESTIMONY OF DR. EUGENE COX

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[954] Q. Dr. Cox, did you perform an autopsy on Mrs. Helen Wood?

A. I did.

Q. Would you tell us what injuries you observed before you began your autopsy?

A. If I may refer to my autopsy notes. Yes, I performed an autopsy on the body of Helen Wood on February 14th. At the time of autopsy, there was a wound

on the front part of the left side of the chest, in the upper part of the breast, just above the nipple area, a penetrating wound of the chest that was narrow and penetrated the full thickness of the chest by probe examination. There were no other wounds that I noted on the external surface of the body.

Q. This wound to her left chest, could you determine from [955] the autopsy what could have caused that wound?

A. Yes, sir, the wound seemed to have been caused by a rather thin, fairly narrow and sharp pointed instrument.

Q. I show you State's Exhibit No. 11, Dr. Cox—By the way, have you seen that exhibit before today?

A. Yes, I have.

Q. Doctor, the wound that you describe on Mrs. Helen Wood, did you find it to be medically consistent with having been caused by that knife you hold in your hand, State's Exhibit No. 11?

A. In my opinion, I feel that it could.

Q. Did you determine the cause of death of Mrs. Helen Wood?

A. Yes, I did.

Q. What was the cause of death?

A. The cause of death was the knife wound or the penetrating wound of the chest. It penetrated the left side of the heart and caused an enormous amount of bleeding into the sacs surrounding the heart and out into the left side of the chest.

Q. Would be be fair to say, then, in layman's terms, that Mrs. Helen Wood bled to death?

A. Yes, I think that is a correct assumption.

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EXCERPT FROM MOTION FOR A DIRECTED VERDICT

[1020] THE COURT: Well, then, Mr. Mauldin, I would tell you this. I will overrule your motion either to quash the indictment or to direct a verdict on the

murder charge for this reason: That indictment apprises you and your client that he's indicted for murder. It, then, sets out specific facts under which the Solicitor says he makes out a theory under those facts which substantiate the charge of murder and submit it to the jury. I agree that those facts substantiate and warrant a charge of murder under a couple of theories of the law. So, I would deny your motion to direct a verdict.

MR. MAULDIN: Your Honor, I would suppose that this hand-of-one, hand-of-all theory, would have to be one of those possibles.

THE COURT: That is one of the possibles.

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[1021] MR. HENRY: You mentioned one theory, the hand of one is the hand of all. Our position is a little more, specifically, would be that the hand-of-one, hand-of-all theory has to be, at least, some point participation where responsibility is cut off. That is what we are talking about here. At some point in time, in some point of participation and action, our client's responsibility would end. He would not be responsible for all consequences after initiation of the first act. In this case, we feel like, at this phase, [1022] the directed verdict phase, that we have shown that the killing which occurred happened beyond the foreseeable result encompassed by our client; and it is proved by the evidence of the State.

THE COURT: Well, you know the law on withdrawing from a conspiracy. You have got to quit before it gets started. You can't get about halfway through it and decide this thing isn't working out too well, I am checking out.

MR. HENRY: I, also, think that the law of conspiracy does not—the fact that they have gotten passed a directed verdict on conspiracy, does not—

THE COURT: Well, I don't mean conspiracy, per se, but I mean the agreement to do something. You have got to get out of it and let everybody know "I am through, now."

MR. HENRY: And it may be different if they had been indicted for conspiracy to commit murder, but they have not. We are not making motions on the ones that is conspiracy before the armed robbery—

THE COURT: But you perceive that the fact that your client might not have been in the store when the killing occurred is of great significance?

MR. HENRY: That, along with, what we can see is the fact, that he did not have cognizance of the presence [1023] of Mrs. Wood, period.

MR. MAULDIN: Your Honor, in fact, there is a principle in the law that says that presence at the scene of the crime is not enough, and we would say that in this case, we have absence from the scene of the crime. So, we are really distressed about that circumstance.

THE COURT: Presence is not enough, but it doesn't say that absence is enough to absolve your client.

MR. HENRY: Your Honor, there is another problem with the indictments. I think it goes to the directed verdict motion as well. We are put in the position, I think, of having to be sustained on a directed verdict for Henry Davis. I think that's the position the Court is putting us in. I don't think that is the law, that we have to prove that Henry Davis did not commit murder in order to have a directed verdict for Dale Robert Yates.

THE COURT: That, of course, would not be true if the facts were not as they are; of the facts that I have before me now that these two fellows walked in, each one of them armed with a deadly weapon, and that your client initiated the violence in that store by shooting first.

MR. HENRY: We are saying that as far as a directed verdict is concerned, as far as the foreseeable [1024] result is concerned, that he would not be responsible for all of the foreseeable results.

THE COURT: Foreseeable is not a proper term in the criminal law. It is reasonable that we are talking about, not foreseeable.

MR. HENRY: In the event that Henry Davis, in this case, had lit the dynamite and blew the building up, after our client was long gone, would he be on trial for murder of the people that were killed or for arson or—

THE COURT: I don't think he would be.

MR. HENRY: I think it is a matter of degree; it's a matter of timing.

THE COURT: Which is a matter for that jury.

EXCERPT FROM TESTIMONY OF DALE ROBERT YATES

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[1064] Q. How long have you known or did you know, prior to his death, Mr. Henry Davis?

A. About eight years.

Q. By the way, how old was Henry?

A. 28.

Q. So, he was five years older than you?

A. Yes, sir.

Q. Did you know Mr. David Loftis?

A. Yes, sir.

Q. How long had you known David Loftis before you were arrested and charged with this offense?

A. About five or six months.

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[1065] Q. Leading up to the couple of weeks prior to the incident, I want to ask you, Dale, you heard Mr. Loftis testify about riding around and looking at places to break into or steal from, didn't you?

A. Yes, sir.

Q. I want to ask you if during that last two weeks or ten days, prior to this incident occurring, did y'all do that?

A. Yes, sir.

Q. Tell me a little about that, what you would do?

A. Well, every couple or three days, we would ride around and look for some places we might could break

into, at night, while they was closed, some businesses or something; rob from there, we'd sell the stuff and get some money.

[1066] Q. You said you did that every two or three days?

A. Yes, sir.

Q. Did you ever have any discussion during those occasions about the possibility of trying to actually rob someone?

A. No, sir.

Q. I am talking about, when I say that, the distinction being that the person would actually be open for business and you would actually go in and require a person to give you something; do you understand?

A. I understand.

Q. Did you ever have discussions, for that ten-day period, say, about actually going into a place and requiring a person to give you money?

A. No, sir.

Q. Now, I want to ask you, Dale, some questions about the day before the incident that occurred at the Wood grocery. Do you recall--that would be February 12th or Thursday—the date before you were arrested—do you recall what you and Henry and David did that day?

A. Pretty much so.

Q. Give me some idea, basically, what you recall, as best you can remember?

A. We went out, we was looking at some more stores. We thought maybe we could burglarize after they was closed and sell whatever merchandise or whatever we found. We [1067] weren't having too much luck being a lot of places had burglar alarms and with the taped glasses and windows and such. We kind of, between us, decided it was really too hard. Everything was so burglarized, we couldn't get into them.

Q. So, at that point, what did you discuss?

A. That we might could arm rob someone.

Q. What type of weapon—Did you have a weapon of any sort at that point?

A. No, sir.

Q. Did David have a weapon that you knew of?

A. No, sir.

Q. Did Henry have a weapon?

A. He kept a knife in the car.

Q. So, after having discussed the situation, what did y'all decide, then, to do?

A. Would you—

Q. All right, once you discussed the idea of breaking into a place and deciding that the places were too burglary proof, then, you say there was discussion about going in and arm robbing somebody?

A. Yes, sir, robbing someone.

Q. What did you then decide to do to get ready for this robbery, if there was going to be one?

A. We decided we would need a gun to persuade whoever [1068] was behind the counter to give us the money.

Q. I want to ask you, do you remember, Dale, when you say "we decided that we couldn't burglarize the place" and "we decided we might need a gun," do you remember what role you were playing and what role David was playing and what role Henry was playing? What was the deal there? Were all three of you discussing it?

A. We were discussing it, but Henry and David was, more or less, going over it, and I would just kind of agree with them, you know, as far as—

Q. When y'all were discussing that, what role were you suppose to play in this robbery that was being thought about?

A. I was suppose to sit in the car and keep a watch out for the police cars or anything.

Q. Where were you suppose to sit in the car?

A. In the back seat.

Q. What was Mr. David Loftis, the man who came in here and testified yesterday, that never was charged with anything, what was he suppose to do in this robbery?

A. He was suppose to go in and get the money from the people.

Q. What was he suppose to take in?

A. A gun.

Q. What was Mr. Henry Davis going to do?

[1069] A. Drive the car.

Q. Whose car were you going in?

A. Henry's.

Q. When it was decided that you were going to need a gun, where were you going to get the gun?

A. From my brother.

Q. And whose idea was that?

A. Mine.

Q. So you—

A. We needed a gun and I just happened to know where we might could get one.

Q. So, you told them that you could get a gun from your brother?

A. Yes.

Q. About what time of day or night did y'all end up going to your brother's place?

A. Evening, just after dark.

Q. Describe to the jury the circumstances of going to your brother's house and what was said and who said it and where you were and so forth?

A. We were in Henry's car and he was driving, David was in the front seat and I was in the back seat. We went down to my brother's trailer, and he was coming across the yard. We hollered, "Hey, how are you doing?" We all knew each other. David said, "I need to go across [1070] town to buy some drugs." He said, "I want to take a gun with me to protect myself in case they try to rob us or anything." He said, "Can I borrow yours?" My brother said, "Yeah." He goes in to get his gun. We had a joint burning. I had it in my hand. I got out

of the car and stepped up into the trailer and handed it to him. He said, "Are y'all in a big hurry? Can you stay and smoke a while?" I said, "I guess we can stay a while." So, I told Henry and David to come on in the house and we sat down and smoked a couple of joints with my brother, and said we had to go on and get across town and wait for our drugs to come in. We left.

Q. A couple of questions with reference to that situation, Dale. Did y'all call your brother ahead of time and ask him if you could do that or did you just drive up?

A. Just drove up.

Q. Was there any discussion with your brother about when he wanted you to bring the gun back?

A. Well, we told him that being as we didn't know what time the drugs would come in, you know—they was coming from a different town—there was a big load coming in, you know, quite a few pounds—there is no telling when it would get into Greenville, and that it might be real late when we got done doing business, that he would [1071] probably be in bed asleep and we would just wait until the next day to bring his gun back to him.

Q. Dale, did you ever intend to go over to another part of town and buy any drugs?

A. No, sir.

Q. But, what you have related to the jury is what was told to your brother?

A. Yes, sir.

Q. In order to get the gun?

A. Yes, sir.

Q. When the gun was actually handed from your brother to somebody, who was it given to?

A. David Loftis.

Q. The fellow who testified in here yesterday?

A. Yes, sir.

Q. When you walked back out to the car, where did you get in?

A. The back seat.

Q. Where did Mr. Henry Davis get into?
A. Behind the wheel.
Q. And where did Mr. David Loftis get in?
A. The front seat, beside Henry.
Q. And where did David Loftis put the gun?
A. Under the seat.
Q. Dale, I know you are not an expert or anything, but [1072] referring to State's Exhibit 10, does that look like the gun that was given to you by your brother, with the holster?
A. Yes, sir.
Q. By the way, does this look like the knife that belonged to Henry Davis?
A. Yes, sir.
Q. What did you do, the three of you—Were the three of you still, then, together and you had gotten the gun from your brother, what did the three of you do, at that point, if you can remember—of course you can only testify to the best of your recollection, Dale, I understand that?
A. I believe we went back to Henry's apartment.
Q. What did y'all do the rest of that evening?
A. Smoked some pot and listened to the stereo.
Q. Do you remember doing anything particular that evening, other than what you've described?
A. No, sir.
Q. Do you remember where you, then, slept the night of February 12th?
A. On the couch.
Q. And you heard Mr. Loftis testify that he slept on the floor?
A. Yes, sir.
[1073] Q. Do you recall whether he, in fact, slept over there that night?
A. Yes, sir.
Q. And this was Henry Davis' apartment?
A. Yes, sir.

Q. What did you do then when you finished sleeping and woke up, give me some idea of what you did that next morning, February 13th, Friday?
A. Woke up, and I did what I usually do, the first thing when I wake up, I rolled a couple of joints and started smoking. Henry smoked a little and David smoked a little. I smoked the majority, myself. We had something to eat. We rolled up a few more joints and David and Henry joined in the smoking.
Q. Let me ask you, now, before you go any further with reference to the smoking and so forth. As far as—again, I am trying to establish the relative position that the three of you would take in your own relationships. When you would be together, who would drink the most, if you were drinking? Who tended to drink alcohol more than the other of you?
A. David.
Q. Who tended to smoke—If you were going to smoke marijuana, who tended to be more favorable to the marijuana and smoke the marijuana?
[1074] A. Myself.
Q. Did Henry drink very much?
A. No, sir.
Q. Did he smoke with you, though?
A. Yes, sir.
Q. When you got up that morning and smoked your marijuana, did you have any breakfast?
A. Yes, sir.
Q. Tell us about what happened as the morning went on and the afternoon came in?
A. Well, right after breakfast, I took the last of the speed I had and was smoking some more pot right after breakfast. Henry and David liked to eat before they started smoking. I like to smoke before I started eating. Smoked some more and rolled up a few and went down and got in the car and went looking for some suspectable [sic] places to rob. Went down through Log Shoals Road area, looked at a few stores down there.

Q. Stop right there. This was the morning or on toward the mid day of the 13th, the day that you ended up going to Mr. Wood's store, right?

A. Right.

Q. When you went into the Log Shoals area or the Donaldson area, whose car did you go in?

A. Henry's.

[1075] Q. And who drove it?

A. Henry.

Q. Where did you sit?

A. Back seat.

Q. Where did David sit?

A. Front seat.

Q. Where was the gun that you had gotten from your brother?

A. Under the front seat.

Q. If you had found a place to rob, what were the roles that the three of you were going to play. Henry was going to do what?

A. Drive, and just keep a lookout.

Q. Dale Yates was going to do what?

A. Keep a lookout for police cars or anything close around.

Q. Which way were you suppose to be looking?

A. The back, out the back glass of the car and to the sides.

Q. And what was David Loftis suppose to do?

A. Go in the store and ask for the money.

Q. Dale, when you were down in that area, was there ever any discussion about what would happen if David went into a store with the gun and the person just said, "No, I am not giving you any money," what was he going to do?

[1076] A. He was to leave, come out of the store and get in the car and we was to leave in a hurry.

Q. Was there ever any discussion about committing harm on a person because they wouldn't give the money?

A. No, sir.

Q. That is, in your presence, was there any such discussion?

A. No, sir.

Q. While we are on that subject of discussion, you heard Mr. Yates [sic] testify yesterday with regard to a couple of statements he had made—

A. Excuse me, I am Mr. Yates.

Q. I mean Mr. Loftis, I am sorry—You heard Mr. Loftis testify about a couple of statements that he said he made about, and the first one was, "I said something about you could get a lot of time for an armed robbery," Do you remember hearing him testify to that?

A. I remember the statement.

Q. Do you ever remember hearing him or Henry Davis, either one, talking about even getting caught, much less getting any time?

A. No, sir.

Q. Did y'all intend to get caught?

A. No, sir.

Q. Did you intend to get any time?

[1077] A. No, sir, we didn't intend to get caught.

Q. And if they wouldn't give the money to you, what was David suppose to do?

A. He was suppose to leave the store, get in the car in a hurry so we could leave in a hurry, because the people would, most likely, call the police, give a description, and they could stop us.

Q. Did you ever hear David Loftis, that morning or any other morning, say anything about the death penalty?

A. No, sir.

Q. When you were down in the area of Log Shoals or Donaldson Center area, and you say you were looking at these places—

A. Yes, sir.

Q. —tell me a little bit about that. Tell me basically where you went and what was said and what was done.

A. Went down Log Shoals Road and there was two small stores down there. We looked at them and they

looked pretty crowded, you know, they are the closest stores to the people in that area without having to go all the way to Mauldin. A lot of people were in and out down there. It was real crowded and we didn't want to stop there. We had just got started and we knew we had a lot more places to look at. So, we rode on over toward Donaldson Center. We looked at some places over there. They were sort of [1078] like the city type, and decided that if they didn't want to give the money to David, that we had to leave and had to get away from the area quick, even though we'd be leaving in a hurry, the people, when they'd call the police and told them that there had been an attempted robbery there, the police would be there soon because they would be close around, beings we was in the city or close to it.

Q. When you say that if they didn't give you the money and you had to leave in a hurry, I assume, if they had given you the money, you were planning on leaving in a hurry, too, weren't you?

A. Yes, sir.

Q. All right, I didn't want you to—the wrong impression there. So, as those discussions were taking place, did you ever actually make any attempt, actual attempt, to rob anybody during the earlier part of that day?

A. No, sir.

Q. What is the next thing you remember doing that morning or around the noon time period, at that point?

A. We left the Donaldson Center, riding over towards the Taylors area, and we went to Why Not's and stopped in there and shot some pool.

Q. Who were together at that point?

A. Henry, David and myself.

[1079] Q. Do you have any idea of perhaps how long you were there or the passage of time, at that point?

A. Maybe 30 minutes. I don't know. We shot three or four games of pool.

Q. What did you do then?

A. We left there and went down to Henry's apartment. David wanted to go down there and make a phone call. We went back to Henry's apartment, fired up a couple of joints while we was there, while he was talking. Then, he wanted to go to Haywood Mall to see his girlfriend. We rode up there. We stopped outside and he went in. We was sitting there in the parking lot. Henry said, "I am getting tired of all of this waiting and wasting time." He said, "We are suppose to have that gun back today." He said, "Go tell him to come on, we've got to go and get this over with." He said, "He can talk to her later."

Q. Wait a minute. Henry said to you to go tell him to, "Come on, we've got to get this over with," because you had to have the gun back?

A. Right.

Q. When he said, "Go tell him, so and so and so," what "him" was he talking about?

A. David.

Q. And David had gone inside the Mall?

[1080] A. Yes, sir.

Q. And you and Henry were suppose to be waiting on him?

A. Yes, sir.

Q. Were you still in the back seat at that point?

A. Yes, sir.

Q. What did you do when Henry said that?

A. I got out, walked in the store, walked up close to the store—there are so many stores in there—the store his girlfriend works in and motioned for him to come over there close to me. I told him that Henry was ready to go. We didn't have all day, you know, to be messing around. We had to get this over with and get the gun back. He said, "Well, I need to talk to Kim." He said, "You know, it is pretty important." He said, "How about y'all coming back about 5:00 and pick me up and we will go on and do it then."

Q. The "Kim" that you are talking about, is that Kim Johnson, the girl that testified in here yesterday?

A. Yes, sir.

Q. All right, go ahead.

A. I said, "Okay, I'll tell Henry." So, I went back out and told Henry that David had to talk to her and that it was important and for us to come back and get him at 5:00. He said that we could go look at a few more places and come back and get him. So, Henry said, "Well, get in. [1081] I got in the front seat. It was vacant. I said, "Well, where are we going. We done been all over a good bit of Greenville." He said, "Well, we can go out to the country spots like I was talking about." I said, "Are you going up toward 290, Willis' store, all the way toward that T. P. Wood's store and on up, if necessary, all around in that country?" He said, "Yeah, we will go look around up in there." So, we went over in that direction.

Q. Now, you were leaving the Haywood Mall, at that point. Do you have any idea, approximately, what time that would have been?

A. 3:10, 3:15. It might have been 3:05. Shortly after 3.

Q. What did you do, then, or which direction, basically, if you remember—who was driving?

A. Henry.

Q. Where were you sitting now?

A. Front seat.

Q. Do you remember what direction, specifically, that Henry took?

A. Not really. I mean, a lot of my time was occupied looking down, rolling up joints. I just didn't really pay any attention which way he was going. I have a idea which way we might have went.

Q. I want you to tell the jury the best you can recall [1082] the basic direction y'all went, whether you stopped or not, just as you were going up toward Mr. Wood's store, tell the jury basically which way and so forth?

A. We went to cut through the Taylors area, and from the Mall, there are several ways to get there. I don't really remember which way we took. We ended up in the Taylors area, around Highway 29. We went down 29. I believe we went up St. Mark Road, which runs into 290, and we took a left up 290, which goes to 25, toward Travelers Rest, the road that branches off of it, one of them is 253, that goes up to the Tigerville area. We was suppose to be looking at these stores over here, you know, if we seen one that we thought could get in and get away from quickly, we'd go back and get David and come back and rob that place.

We stopped at a gas station, Clark's station, and I went in and was looking around and bought two beers while I was there because marijuana makes you very thirsty when you smoke it, so I wanted something to quench our thirst. It was pretty crowded in there. I walked back to the car.

Q. Stop right there, Dale. You are talking, now, about Leonard Clarke's store. Have you ever seen that map before?

A. Just from a distance in here.

[1083] Q. During this case. Step down just one second so we can point out to the jury, basically, the position that you and Henry were at that point.

(Witness goes to front of jury).

This right here, this big dark line, is Highway 29, this is your Taylors area, and this is Greer area. This right here is 290, going up this way. Here is Leonard Clarke's service station. That is where y'all were at that point, is that correct?

A. Yes, sir.

Q. All right, go ahead and have a seat.

(Witness returns to stand.)

When you went into Leonard Clarke's store, did you have a gun with you?

A. No, sir.

Q. Where was the gun?

A. Under the front seat.

Q. Were you going in that store to actually commit any offense at all?

A. No, sir.

Q. When you left the store and went back out, where was Henry?

A. In the car, waiting.

Q. In the driver's seat?

A. Yes, sir.

[1084] Q. What did you do when you got there?

A. Handed him a beer. He said, "How did it look in there?" I said, "Well, it was crowded, but it might not be by the time we get back with David."

Q. So, you were still thinking y'all might still go back and get David, is that right?

A. Yes, sir, we was suppose to go back and get him at 5:00.

Q. Go ahead.

A. Henry said, "Well, we can ought to rob the place just as David can. I mean, all we got to do is go in and ask for the money and get it and leave or don't get it and leave."

Q. What else was said about that and, at this point, you are at Leonard Clarke's and you are leaving Leonard Clarke's place, still going north?

A. Yes, sir.

Q. Is that the first time that it had been brought up that you and Henry would be the two, only two, doing this?

A. Yes, sir.

Q. Tell the jury about that discussion, about how that came up.

A. When I came out of the filling station and got back in the car, Henry asked me how did it look in there, and I said, "Well, it is crowded right now, but it may be [1085] less crowded when we get back with David." He said, "Well, we don't, necessarily, need David. We can arm rob a place just as easy. All we have to do is walk in and ask for the money and they will either give it to

us and we leave and if they don't give it to us we leave, whatever."

Q. At that point, Dale, was there ever any discussion about harming anyone?

A. No, sir.

Q. Was there any discussion about—well, put it this way: If the person did not give you the money, or Henry the money, or whoever, what were you suppose to do?

A. Leave and get away out of the area quick, just as if we'd got the money. Just get out of there to avoid the police catching us.

Q. So, you left Leonard Clarke's store and then what did you do?

A. Continued on up 290 and there was some little—looked like a restaurant or something at a fork in the road.

Q. You don't know what the name of the place is, do you?

A. It seems like it had to do with Sandy Springs or something.

Q. And you, except for seeing this at a distance and so [1086] forth, you have never examined this map before, have you?

A. No, sir.

Q. Come down and see if they have put this place you are talking about on this map.

(Witness goes to front of jury.)

Here is Leonard Clarke's grocery, again. It is 291 going north. This is way up in Tigerville here. You are still coming up 290, can you tell us whether or not any of those places right in this particular intersection area might have been the place you are talking about?

A. I'd say this place right here (indicating).

Q. That is Sandy Flat grocery. You are not familiar with it other than riding by it that day?

A. That's it.

(Witness returns to stand.)

Q. When you got to Sandy Flat grocery, what happened then? Again, be sure that you project your voice toward the jurors because they have to hear every word you say.

A. It's in a fairly congested area. There is more stores there than one. There was a lot of people around. We just decided that wasn't a good place to go in and try. So, we had a little while left, we decided we'd go on up the road and look as far as North Carolina line, if we had to go that far. We knew of T. P. Wood's store, up there, and we knew there was some more stores up [1087] around that area.

Q. That intersection where Sandy Flat grocery area is, was that the first intersection or the first place that you two cased out, so to speak, after it was decided that the two of you would do it, instead of going back and getting David?

A. Yes, sir.

Q. And it was decided not to do anything in that area?

A. Right.

Q. What did you do then?

A. We took that right road from there, the right fork. And we continued on up through the country. I don't really remember passing any other stores til we got to the T. P. Wood's store. It seemed it was out where there wasn't anything around, no cars or anything. It looked like it was just sitting there. Wasn't a bunch of people going to be running in and out that we'd run into or anything.

Q. Dale, before you get into that, you said just a moment ago that you didn't remember passing any other stores. Is there a possibility that you could have passed some other stores and you just don't happen to remember them?

A. Oh, yes.

Q. Now, at the point you arrived at Tigerville, I want [1088] you to tell the jury, as specifically as you can, the actions of you and Henry in the car before you ever went into the store. Let's get that out of the way first. Which

direction and, again, Dale, this being the interior of the store and this being the road, like this, this would be going north and this would be coming back south. Which way were y'all heading when you passed the store?

A. North.

Q. When you passed the store this way, the store was on your right?

A. Yes, sir.

Q. When you passed the store the first time, did you stop the car?

A. No, sir.

Q. Did you ever pull the car up in between the gas pumps and the building, up in this area?

A. No, sir.

Q. Did you ever pull up in this area and sit in the car for 15 or 20 minutes?

A. No, sir.

Q. So, what did y'all do as you approached Mr. Wood's store, with it being on the right? What did y'all do?

A. We looked over at it. Wasn't nothing close to it, wasn't any cars in the parking lot, wasn't anybody coming in or going out. We didn't know whether there could [1089] have been customers inside or not, because you can't see inside. But there wasn't any cars outside.

Q. What did you do then?

A. We continued on going by it and it sort of like it starts down a hill, the road. Me and Henry was looking it over and said, "Well, what do you think about this one?" He said, "Well, it looks deserted. It's not crowded. Not anyone in the parking lot. We will go back and look at it."

Q. By the way, while you are on that particular subject, when you are sitting here in the road, and you keep on going pass the road, do you go downhill or uphill?

A. Downhill.

Q. So, from this point, going in that direction, is downhill, right?

A. Yes, sir.

Q. Which means that a person coming this way would be coming uphill, right?

A. Yes, sir.

Q. Do you know, Dale, and, again, I refer to this map, do you happen to know how far up the road, above the Wood store, y'all might have gone before you turned around, would you be able to say?

A. I can guess.

Q. Well, that will be fine if that is all you can do. [1090] But, looking at this particular area, being Tigerville, do you have any idea at what point you turned around, and if you don't, that's all right. I am just trying to refer to this as much as possible?

A. I seem to remember this creek.

Q. Did you go as far as the creek, then?

A. We turned around somewhere close to this creek.

Q. Who was driving, then?

A. Henry.

Q. When Henry turned the car around—When you were going downhill, did y'all pass anyone that you recall?

A. Yes, sir, there were a couple of people out jogging.

Q. As you passed these people, went down and turned around, did you then pass them again?

A. Yes, sir.

Q. Do you have any idea how far you were from the store?

A. Maybe a mile, I don't know.

Q. And they were jogging toward the store?

A. Yes, sir.

Q. Go ahead. Tell us what you did then.

A. Said we'd go in and look in this store, if no one in there, we can ask for the money and either get it or not get it and we can get back out because by the time these people running up this road get there, we are going [1091] to be gone anyway. It's going to take a minute at the most to be in the store. Maybe not a minute. Just

walk in and, you know, we didn't plan to be in there no time. We pulled in—I call it a parking lot—we pulled off the side of the road.

Q. Excuse me just a minute. Does that look like—referring to State's Exhibit 3—the store you are talking about?

A. Yes, sir.

Q. What did you do then? Where did you park?

A. In front of the store, just to the side of the road, but not in the lane.

Q. As best you can, show me and if necessary we will get down and show the jurors, at what point would you have pulled the car up? This being the front door of the store and this being the other front door in the post office area.

A. Right about here (indicating).

Q. Step down just a second and show these members of the jury first and we will come down.

(Witness goes to jury.)

With this pen, show the jury the three gas pumps right here, the front door of the store, here, and the front door of the post office down here, where, basically, the car was parked?

[1092] A. Right about here (indicating).

Q. Pretty much, then, directly in front of the front door that has the pumps in front of it?

A. Yes, sir.

Q. Have a seat.

(Witness returns to stand.)

Which way was the automobile, then, traveling, north or south?

A. South.

Q. Where were you sitting when you pulled up in front of the store?

A. In the front seat.

Q. Henry was still driving?

A. Yes, sir.

Q. Tell me what happened, then, Dale?

A. After we turned around and was coming up the hill, Henry told me to get the gun out from under the seat, you know, we was going in. I stuck it in my pants and that was while we was coming back up the hill passing the pepole, whatever, just after we'd passed them. We pulled in, stopped and got out, walked in, just like anybody else would. We went in and Henry went to the left of one counter and I went to the right of one counter. We wanted to look around to see how many people was in the building.

[1093] Q. Did you look around?

A. Yes, sir.

Q. And how many people were in the building?

A. One, besides Henry and myself.

Q. Right. Did you know that there was a lady in the building?

A. No, sir.

Q. What happened then?

A. What—

Q. What did you do when one went on one side of the counter and one on the other, walked down the counter to look around, then what did you do?

A. We was thirsty, so we was going to get a pepsi while we was there. The side I went down, they wasn't on and the side Henry went down, they was on. While we was opposite of each other, we seen that there was only one man in the building and he was behind the counter. There wasn't nothing around, you know, we could ask for the money, either get it or not get it, and leave, and it was so far away we could be out on any road before, you know, the police could get there.

Q. Go ahead.

A. We decided, yeah, we'd go ahead and see if it will work.

Q. Wait a minute. At what point was this "yeah, we'll [1094] decide and see if they'll give us the money."

How was that made, you were inside the store at that point, right?

A. Nodded affirmatively.

Q. Go ahead. Explain to the jury how that came up.

A. I was looking in one case and they had cokes and other drinks in there or something, and the side Henry was one, had pepsis and other different types of sodas over there. Henry said, "What do you think, does this one look like a good one?" I said, "Well, there is only one person in here." He said, "Do you want to try it?" I said, "Well, we might as well."

So, I come around to the side he was on and took a pepsi up to the counter and I pulled the gun out from the waist of my pants and told the man I wanted the money.

Q. Okay, now, was that Mr. Willie Wood that testified earlier in the case, in the brown suit, here?

A. Yes, sir.

Q. And you pulled the gun and told Mr. Wood you wanted the money, is that right?

A. Yes, sir.

Q. Then what happened?

A. He said, "What money?" I said, "The money in the cash register." He said, "There is not that much in there." I said, "I don't give a damn, I want the money." He mashed the button thing and opened it.

[1095] Q. Now, at that point, were you or Henry standing directly in front of this gentleman?

A. I would be to his right and Henry would have been to his left.

Q. So, he was on the other side of the counter, facing you, and you were on this side, and Mr. Davis would have been on this side?

A. Yes, sir.

Q. And Mr. Davis had the knife?

A. Yes, sir.

Q. What did Mr. Wood, then, do when he opened the cash register drawer?

A. He reached in and got the $20-dollar bills out of the little slot and laid them down on the counter and just

looked at Henry a couple of seconds and Henry said, "All of it." He got the rest of the bills out, the $10's, $5's and $1's. He laid them down on the counter. Henry picked them up and handed them to me.

Q. Henry picked up the money?

A. Yes, sir.

Q. And Henry hands the money to you?

A. Yes, sir.

Q. Go ahead.

A. I figured he was going to get the pepsi we set up there and we was going to leave. He handed me the money.

[1096] Q. What did you do when you got that money?

A. I looked toward the door just in case there was some very fast joggers or something or if anybody else was coming in.

Q. Did you have any idea or can you give the jury an estimate about how far you would have been, then, from the door, do you know at that point about how far you were from the door when he gave you the money?

A. Feetwise. 15 feet, I don't know. I'm not a good judge of distance. I'd moved a couple of steps up and looked and looked back.

Q. Go ahead. What happened? You had the money and you were backing and looking and backing and looking, what happened then?

A. Henry told the man to lean over the counter.

Q. Did you hear him say that?

A. Yes, sir.

Q. All right, go head.

A. He—Henry wasn't following me out. He was just standing at the counter and he had told him to lean over it. I didn't know, maybe he wanted him to lean over it so he couldn't get to a gun, you know, to give us time to get outside the building. I took a couple of more steps and was looking out the door, you know, to make sure we didn't run into anyone, would look back, you know [1097] letting the man know that I was watching him just, you

know, hoping that he wouldn't grab a gun and start shooting us; you know, getting time to get out the door. I was looking. I was pretty close to the door, then

Q. Do you have any idea, Dale, the distance—Did you ultimately fire the gun, by the way? Did you ultimately fire the gun?

A. Yes, sir.

Q. Do you remember how far you were from the door at the time you fired the gun?

A. Two steps, 6 or 10 feet. I don't know. About two steps.

Q. Go ahead. At this point, you are backing and going toward the door and watching Mr. Wood, and you heard the statement of Henry, then, what hapepned?

A. He said, "Lean over the counter." I was backing, I was doing this rather quickly, trying to get to the door and trying to watch what was happening back there. I didn't know what was going on. I just knew Henry wanted him to lean over the counter. He told him to. I figured he just wanted to kep him from being able to go under the counter and get a gun or something. So, I took a couple of more steps and Henry said, "Shoot!" I turned around and the man's hands was down, I figured he had gone for a gun. So, I leveled mine off at him and fired [1098] right quick and his hands started coming up and I just knew the man had a gun and was fixing to start shooting so I fired again. His hands came up empty. At that time, I heard a female voice say, "What's going on out there?" I said, "Let's go." I turned and took two steps and was out the door.

Q. What did you do, then, when you came out the door?

A. I ran around the front of the car and opened the passenger's side and sit (sic.) down and was waiting for Henry to come on out, you know, to leave. I sat the money dow non the seat and I had the gun setting there and Henry didn't come out. I was looking at the door, and I said, you know, he should have been here. Maybe

ten seconds had gone by, I don't know. I had done panicked by then. I'd done shot and hit a man with a bullet. Thangs had gone wrong and all. I was upset, scared, frightened. I don't know, I was very upset. I noticed the key in the ignition and I reached over and turned the car on. I looked at the door again and Henry wasn't coming out. So, I didn't know whether they had caught him or what. The man didn't seem to be hurt bad when I shot him. You know, he didn't just drop or anything like that. It seemed like it barely hit him or something. I mean, I wasn't even sure he'd been hit, as a matter of fact. I mean, I seen no blood or anything. I said, "Well, he [1099] caught Henry. He grabbed Henry. No use me staying here and getting caught." So, I jumped over under the wheel, put the car in drive, and left.

Q. Dale, you, then, were later caught down on a country road in that area, were you not?

A. Yes, sir.

Q. So, the testimony from the number of witnesses with reference to that is basically correct?

A. Yes, sir.

Q. I want to do one thing, Dale, so the jurors will have some idea when you are referring to—Dale, I am going to ask you to come down and from the time that the two of you—Now, first of all, to orient you to the store, itself, this is the front door into the grocery area and the three pumps. This is the door way into the post office area; this is the back area of the store. This is the bullet hole that apparently went out the back of the building. The ice cream box which sits right in front of the front door, just inside the door. This is the soda box. This is the counter on which the cash register is, the check out area, and meat case. I want you, first of all, to disregard all of these little markings on here. Those have been put by witnesses. I want you to testify as to where you went and what you did. Disregard that,

just pay attention to the actual [1100] model. From the point the two of you went into the store.

A. We'd have been stopped right here. We went in the store here. Henry went this way. I went this way. I stopped right about here, because I was looking for a soda, and Henry was on this side. There was one man in the building. He was right back here, and didn't see anybody else in the building. While I was looking here and Henry was over here, as testified to, Henry said, "You want to try it?" Just one person in there. We could ask for the money, either get it or not, and leave and get gone, because we figured these jogging people, it would take them some time to run up that hill. They was down near the bottom when we passed them.

Anyway, I came around this way, after we'd agreed to try it, and walked up to right here at this counter, and Henry stood right about here. I stood about here. I took the gun from the waist of my pants and told this man, standing right here, to give me the money.

Q. All right, now, he was behind the counter and you were on this side of the cash register, is that right?

A. Yes, sir.

Q. Go ahead.

A. Here is—

THE COURT: Mr. Mauldin, it is not necessary to go back through the entire testimony. I thought you wanted [1101] to point out places on there where he was.

MR. MAULDIN: I am.

THE COURT: But not just recount the entire oral testimony again, which is about what he's doing.

MR. MAULDIN: Your Honor, I would be surprised if we couldn't allow him to use the chart that the State had put into evidence to show the locations of the people—

THE COURT: Let him give the locations, but he's just starting in, now, with the entire oral testimony again, that he just gave. Why doesn't he just point to

the locations: Here I was when this happened, there I was when this happened.

MR. MAULDIN: Your Honor, if you wish to limit him, I, certainly, will instruct him.

THE COURT: Well, do you want him to testify twice, Mr. Mauldin. If you do, let him go ahead.

Q. Just tell where you were David.

A. Right here.

Q. Is that when you told Mr. Wood to give you the money?

A. Yes, sir.

Q. Where was Mr. Davis when Mr. Davis got the money?

A. Right about here.

Q. He was on the other side of the cash register from you?

A. Yes, sir.

[1102] Q. When Mr. Davis handed the money to you, what did you then begin to do?

A. He handed me the money, I turned and started up this way, looking out the door, this door here. I looked back and come back. I wanted to watch the man to make sure he didn't shoot me while I was trying to get to the door. I guess I was around in here somewhere. I heard Henry say, "Lean over the counter." I looked back and the man jumped back from Henery.

Q. Were you continuing to move in which direction?

A. I was coming this way, looking out the door, making sure I didn't run into anybody—I didn't want to completely just back out the door watching him, because somebody could have gotten me from behind. I wanted to watch both ways, so I kept looking back and forth.

Q. When you heard Henry Davis say, "Shoot him," where, approximately, how far from the doorway, then, were you?

A. About two steps away.

Q. Can you give us some idea on the chart there, your approximate location, the best you can recall?

A. Near the end of this candy case, along this area in here.

Q. Had you ever been in that store before?

A. No, sir.

Q. Have you ever been in it since?

[1103] A. No. One time I've been in the store.

Q. When you fired the shots, what did you then do?

A. I ran out this door.

(Witness returns to stand.)

Q. Dale, when you heard the voice, "What's going on out there?", did it appear or could you tell whether it was a male or female voice?

A. It seemed like a female voice.

Q. What did you say immediately upon hearing the voice?

A. "Let's go!" And I ran out the door.

Q. From the time you said that, did you ever have anything but your back turned to that door, until you got in your car?

A. Just my back. Like I said, I heard, "What's going on out there?" I said, "Let's go!" I turned and out the door.

Q. Did you ever, at any time, see a female?

A. No, sir.

Q. Would you know Mrs. Helen Wood if you saw her right now?

A. No, sir.

Q. Dale, I want to ask you if you had the occasion on a previous occasion to come to court, back on March 21, 1975?

A. Yes, sir.

[1104] Q. At that time, I want to ask you if you entered pleas of guilty to certain offenses?

A. Yes, sir.

Q. On that particular occasion, Dale, did you enter pleas of guilty to four counts of arson?

A. Yes, sir.

Q. And four counts of larceny?

A. Yes, sir.

Q. And two counts of housebreaking and larceny?
A. Yes, sir.
Q. How old were you when you went to court in March of 1975?
A. 17.
Q. Is that the first time you had ever come to big court?
A. Yes, sir.
Q. Why did you plead guilty to those charges when you came to court in 1975, when you were 17 years old?
A. I was guilty.
Q. Did you plead not guilty to the murder of Helen Wood in this case, Dale?
A. Yes, sir.
Q. Why did you plead not guilty?
A. I didn't kill Helen Wood.

* * * *

[1108] Q. Were you working back in February of 1981?
A. Yes, sir.
Q. Where were you working?
A. American KARO Corporation.
Q. Were you working on February 13th?
A. No, sir.
Q. Didn't work that day?
A. No, sir.
Q. Work the day before?
A. No, sir.
Q. How long had you been without a job prior to February 13th?
[1109] A. About two weeks.
Q. So, you quit working about February 1, 1981?
A. Well, I was fired, sir.
Q. And, Henry Davis didn't have a job either, did he?
A. No, sir, he was, what do you call it—I can't think of the word.

Q. He had a physical disability?
A. Yes, disabled.
Q. So, he didn't work?
A. No, sir.
Q. So, you had plenty time on your hands and very little money?
A. Yes, sir.
Q. During this period of time that you would ride around the county, daytime and the nighttime, with Henry and on occasion with Loftis, and talk about breaking in and stealing something?
A. Yes, sir.
Q. Committing housebreaking and grand larceny?
A. More like storebreaking and grand larceny.
Q. But, you never did that, did you?
A. No, sir.
Q. Because you decided that it was wrong to break in and steal?
A. No, sir.
[1110] Q. Because you figured you might get caught doing it?
A. Because there was a lot of burglar alarms on these places.
Q. And what do burglar alarms help do?
A. Help get the police there. They draw attention when you go in.
Q. And help you get caught?
A. Yes, sir.
Q. But you progressed from breaking in and stealing to committing armed robbery?
A. Yes, sir.
Q. On the night of February 12th, you suggested, "Well, if we're going to commit armed robbery, we had better get us a gun."
A. No, sir, that is not the way I said that.
Q. You suggested a way you could get a gun?
A. Yes, sir, that is what I suggested.

Q. And you took your friends over to your brother's house and you did accomplish what you took them over there to do?

A. Yes, sir.

Q. Get a gun. I don't believe there is any question about the fact this is the gun?

A. That looks very much like it.

Q. Old model gun breaks down in the middle like that?

[1111] A. Yes, sir.

Q. Carries five shots?

A. Yes, sir.

Q. It's a revolver?

A. Yes, sir.

Q. You had seen this gun before?

A. One just like it, I would say.

Q. You knew he had it?

A. Yes, sir.

Q. You knew where you could get your hands on a pistol if you wanted it?

A. If I could give him a good reason.

Q. Well, you thought up a pretty good reason, I guess?

A. Yes, that is what he had it for, as a matter of fact.

Q. You mean, to protect yourself if you are out buying or selling dope?

A. That, and if anybody broke in on him. He would have it there to protect hisself.

Q. Anybody broke into his trailer, you mean?

A. Yes, sir.

Q. You went over there that night and you got this gun, right?

A. Yes, sir.

Q. And you continued to talk about armed robbery that night?

[1112] A. Yes, sir.

Q. Over at Henry Davis's house?

A. Yes, sir.

Q. As you planned the armed robbery?

A. Yes, sir.

Q. And the next day, you went out driving through the county?

A. Yes, sir.

Q. Henry had some stores in mind, didn't he?

A. Yes, sir.

Q. You had some stores in mind, didn't you?

A. Yes, sir, just stores we knew where they was at, I mean, you can't help but know where stores are.

Q. Say, how about the store on Log Shoals Road, for example?

A. Yes, sir.

Q. You'd say, how about the one over behind Donaldson Center, for example?

A. Yes, sir.

Q. How many different stores you ride around to?

A. Five or six around that area. We looked at other stores on the way over toward Taylors.

Q. But first off that morning, you at least checked out five different stores?

A. Yes, sir.

[1113] Q. In the southern part of the county?

A. Yes, sir.

Q. Ride by and check them out?

A. Yes, sir.

Q. Get out, go in, and see who's there?

A. Yes, sir, if necessary. I think we went in one, but it was just to get some cigarettes. It was a Pantry and we didn't want to try to rob no Pantry.

Q. Why is that?

A. It's just right there on a main road, you know, a main highway went beside.

Q. You might get caught?

A. Well, yeah, because we might not be able to get out because of running into cars or something.

Q. Too much traffic along there and big plate glass windows in the store?

A. Yes, sir.

Q. You checked out at least five stores that morning? In the southern part?

A. I guess. I know of three for sure.

Q. And the plan was, you told the jury, that Loftis was suppose to go in with the pistol?

A. Yes, sir.

Q. In fact, it was riding around in the car with you all that morning, wasn't it?

[1114] A. Yes, sir.

Q. In this holster?

A. Yes, sir.

Q. Just like this?

A. Yes, sir.

Q. Loftis had it up there sitting between his legs?

A. It was under the seat.

Q. It was under the seat when you got it?

A. It was under the seat when I got in the car because that is where he had placed it.

Q. But Loftis never went in any store, did he?

A. No, sir.

Q. In fact, every time you came to a store, he would tell you why that wasn't a good one to rob, y'all would discuss it, too much traffic, too many people?

A. The three of us would decide.

Q. And Loftis, each time, each time, he indicated that he didn't want to rob that store?

A. For various reasons, the same reasons that me and Henry decided, too.

Q. But he was the person that was suppose to go in, wasn't he?

A. Yes, sir.

Q. But, each time he said, "This isn't good; I'm not going to do it. Let's don't do it."?

[1115] A. We would discuss it, and if the three of us decided it wasn't a good store, we wouldn't go in. I mean, if he decided separately on his own, then that would be all right, too.

Q. All right. That is what I mean. If he decided to go in any of those five stores you looked at in the southern part of the county, the plan would have gone off, you would have watched, Henry Davis would have driven the car, and Loftis would have gone in?

A. Yes, sir.

Q. Because the man going in with the gun had the final say so. He's taking the greatest risk?

A. Yes, sir.

Q. Each time Loftis said, "No," isn't that right?

A. The three of us decided, no.

Q. But each time he said no, you agreed with him, right?

A. Yes, sir.

Q. But you couldn't have made him go in any way, could you, if he didn't agree to do it?

A. No, sir.

Q. He had the final say so?

A. Yes, sir.

Q. Isn't that correct?

A. Yes, sir, I'll go along with that.

[1116] Q. He never would do it, would he?

A. No, sir.

Q. He gave excuses and all of you agreed, "Well, you're probably right. We had better not do it, too many cars, too many people, not a good location."

A. The three of us would give excuses.

Q. But each time Loftis gave an excuse, didn't he?

A. He would agree with ours or he would come up with one on his own.

Q. But, if he came up with one of his own, or he agreed with one of yours, that was it. But if he said, "We're not going to do it," it wasn't going to happen?

A. Right.

Q. And it didn't happen?
A. Right.
Q. He never got out of that car and went anywhere with a pistol, did he?
A. No, sir.
Q. Not in the southern part of the county, not up 291, not out on Wade Hampton and certainly not in the Tigerville area?
A. No, sir.
Q. In fact, after driving around that morning, you went to Why Not's?
A. Yes, sir.
[1117] Q. Got there about noon time or so?
A. Somewhere thereabouts.
Q. Shot some pool?
A. Yes, sir.
Q. Get something to eat?
A. No, we didn't eat there.
Q. Played some of the pinball machines or what?
A. Shot some pool. We might have shot a game or two on a flipper machine.
Q. Did you have a good time?
A. Fair I guess.
Q. Then, Loftis said, "Look, I want you to take me on out to Haywood Mall." Y'all rode on out there?
A. No, sir.
Q. Where did you go?
A. We went to Henry's apartment.
Q. Well, you went there very briefly and then you went to Haywood Mall?
A. Yes, sir.
Q. Loftis talked to his girlfriend at the apartment?
A. I imagine that is who he called. I didn't pay no attention to it.
Q. As soon as he hung up the phone, y'all left and took him to his girlfriend's?
A. Right.

[1118] Q. He went on in?
A. Yes, sir.
Q. He said, "Y'all come on back and get me later. I am staying," or words to that effect?
A. Yes, sir. It would have been about an hour and a half, I guess, I don't know what time it was. It was around 3.
Q. But he got out of the car and didn't get back in?
A. Yes, sir.
Q. Hadn't been any robberies going on that morning that you were involved in?
A. No, sir.
Q. Nor that afternoon?
A. No, sir.
Q. Loftis got out of the car and he left you and Henry?
A. Yes, sir.
Q. And he left you with two things, didn't he?
A. What two things?
Q. Henry's knife and your brother's pistol?
A. Yes, sir.
Q. They were in the car?
A. Yes, sir.
Q. Now, Loftis is out of the picture. He's gone. Stayed there at Haywood Mall with his girlfriend and you and Henry drove off?
[1119] A. Yes, sir.
Q. And you end up in the northern part of the county in Tigerville?
A. Yes, sir.
Q. But before you get there, you drive up St. Mark Road?
A. I think that is the route we took.
Q. St. Mark Road is listed on this diagram, is it not? I believe you pointed it out to Mr. Mauldin.
A. I didn't point out the St. Mark Road, but I believe I could find it.

Q. Well, it is marked on here, Mr. Yates, would you agree that the diagram of this map is correct, if this is Highway 29, this is St. Mark Road that leads up to 290 and goes right to Leonard Clarke's store?

A. Yes, sir.

Q. You are very familiar with that area, aren't you?

A. Yes, sir. Familiar with St. Mark Road?

Q. Yes, sir, that part that leads up toward Tigerville?

A. Fairly.

Q. Have you been up there before?

A. Yes, sir. I have been up that way going to Boy Scout Camp.

Q. And you have been up there on other occasions, too, haven't you?

A. We rode up to the mountains, going up 290.

[1120] Q. So, you know the area, generally speaking?

A. Not the area. I know a few of the roads up that way.

Q. Well, you know the main roads, like St. Mark Road, like Highway 290?

A. I am familiar with those roads.

Q. What I mean is you are not just in strange territory when you hit St. Mark Road, are you?

A. No, sir.

Q. You have been there many times before?

A. Yes, sir.

Q. You knew of the Wood store before this, too, didn't you?

A. I knew it was there. I passed by it going to Boy Scout Camp and up in the mountains.

Q. As a matter of fact, before the 13th, you had been up in that area checking out some of those stores to rob, hadn't you, to break into, you and Henry? Like Willis's store up there on 290.

A. I believe Willis's was as far as we went up that way, right around that area.

Q. That is at least halfway up to Tigerville, isn't it, Highway 29?

A. Halfway, I guess. I don't know. It didn't look exactly halfway.

Q. Well, you mentioned the Sandy Flat Grocery in your [1121] testimony.

A. We passed that on the way up there that day.

Q. Willis's store is less than a tenth of a mile from the Sandy Flat grocery.

A. We passed that on the way up there the day of the robbery.

Q. But you went up to Willis's store before that, checking it out.

A. Yes, sir, we had been up that far. Been riding different places looking at different places.

Q. To store break?

A. Yes, sir.

Q. To steal?

A. Yes, sir.

Q. This was before the 13th?

A. Yes, sir.

Q. So your travels in this area, though, were, on the 13th, nothing really new to you?

A. Not up St. Mark and 290.

Q. Do you remember, then, on that day leaving the Haywood Mall. In fact, you even remember going to the apartment and Loftis making a phone call before you went to the Haywood Mall, don't you?

A. Yes, sir.

Q. Going to the Haywood Mall?

[1122] A. Yes, sir.

Q. Talking to Loftis and he says he's leaving?

A. He said he was staying.

Q. He was staying and you were leaving?

A. Well, inside the car, he said he was going inside, if that is what you meant by leaving.

Q. You remember all of that?

A. Yes, sir.

Q. And you remember driving up Highway 29?
A. Yeah, I guess we took 29 through Taylors over to St. Mark.
Q. Driving up St. Mark Road and then going to Leonard Clarke's store?
A. Yes, sir.
Q. You remember Mr. Percy Rochester who testified yesterday?
A. I remember him from yesterday.
Q. Do you remember Mr. Leonard Clarke, the man you bought the beer from?
A. I remember him from yesterday.
Q. You don't remember him in the store?
A. Not really. I mean, I didn't pay any attention to him, really.
Q. When you went to Leonard Clarke's store, this is some time in the middle afternoon, is it not?
[1123] A. Yes, sir.
Q. You were checking that store out, weren't you?
A. Sort of, yeah.
Q. Well, you sort of, because you drove through there, pass the store and the parking lot real slow; do you remember that?
A. Are you talking about the Leonard Clarke store?
Q. Yes, sir.
A. We drove in and stopped.
Q. Do you remember stopping on out on the highway, where the front of your car is almost out on the highway?
A. We were off the road in front of the door.
Q. And you got out to go in and check it out?
A. Yes, I got out and went in to get us something to drink because we were thirsty.
Q. Just like you went in the Wood store to get you a pepsi because you are thirsty.
A. Yeah, you know, we were checking it out. We were suppose to go back and get David like I testified to, like I said. Me and Henry decided we would go ahead and check out some places.

Q. How do you check out a place when you go in? What do you look for?
A. That I don't know, just how many people work there.
Q. How many people, that is important, isn't it?
[1124] A. How many people work there.
Q. That really is the most imoprtant thing, isn't it? As far as going in a store, that is what you want to know, how many people work there?
A. Yes.
Q. If you go in there and see how many people are in there, that doesn't have anything to do with how many people that are going to be there at 5:00 that afternoon, does it?
A. Like I said in my statement, when I got back to the car, and Henry asked me how it looked in there. I said, "It is crowded right now, but by the time we get back with David, there might not be no one in there but who works there.
Q. As a matter of fact, you went in that store to check it out and you did and there were about seven or eight people in there, weren't there?
A. There was a few people in there. I can't give you a number.
Q. So, you bought your beer?
A. Yes, sir.
Q. Tried to be very pleasant to everyone, didn't you?
A. I was nice to them, yes, sir.
Q. Have a nice day.
A. Yes, sir, that is what I told them as I started out [1125] the door.
Q. You remember telling him that?
A. Yes, sir. I notice he said I said it twice. I remember telling him "have a nice day," once.
Q. How many beers did you buy?
A. Two.
Q. What kind?
A. Miller.

Q. Tall ones or short ones.

A. 12-ounce bottle.

Q. You bought two 12-ounce Miller beers, you remember that?

A. Yes, sir.

Q. "Have a nice day," and back to your car. "Henry, we better not get this place, too many people in there." Is the gun still under the front seat at this time?

A. Yes, sir.

Q. Then, you continued on up the road to check out another place?

A. Yes, sir.

Q. Around the Sandy Flat area?

A. We was riding up through that way, yes, sir.

Q. Do you remember riding by Paul Butler's store and checking that one out?

A. I never went in it, wherever it was at.

[1126] Q. Do you remember going by a store that was locked and you couldn't get in?

A. No, I never tried to get in any store that was locked

Q. Then you continued on up to finally you get to Tigerville?

A. Yes, sir.

Q. The truth of the matter is, you checked out and you knew where that store was, didn't you?

A. I've been by it, yes, sir.

Q. You pulled in there and stopped to check it out?

A. We passed it coming. I am not sure whether you are saying—Would you rephrase your question?

Q. Before you went in the store, you testified you drove down the road and came back. As you approached the store, going in a northerly direction, the truth of the matter is, you stopped there on the side to see what was going on?

A. No, sir.

Q. So, the only checking out you did of the Wood store is ride by and look?

A. We rode by and looked. There weren't any cars in the parking lot. We didn't think there was anybody inside. We knew there could be somebody that walked in. So, we decided we'd go back and look.

[1127] Q. You couldn't see inside the store, could you?

A. No, sir.

Q. You didn't know how many people were inside?

A. No, sir.

Q. When you did go in, your testimony, the first time you went in, both of you went in armed?

A. Yes, sir.

Q. That is the first time that has happened all day?

A. Yes, sir.

Q. Because the other times you went in the store was to check them out and you didn't take your pistol with you, did you?

A. No, sir. I was under—well, that's okay.

Q. Loftis, you and Henry, y'all had talked about what might happen when you go in a store to rob it, didn't you?

A. That they might not want to give us any money.

Q. And they might have a pistol under the cash register or under the shelf or something like that?

A. I don't remember ever discussing it, but—

Q. You knew it, though, didn't you?

A. I guess I knew there was a possibility. I mean, people have guns under the cash registers.

Q. And you knew that to be a common practice?

A. Some people, I guess.

[1128] Q. You testified what y'all were going to do is just go in and say, "Give me the money," and if they said no you were going to leave and if they said yes you were going to leave, is that right?

A. Yes, sir.

Q. What happens after an armed robbery is committed, as far as the victim is concerned? What do they do?

A. Call the police.

Q. Call the police, put out a description, describe the car, then you get caught. Isn't that what you testified to just a while ago?

A. You don't necessarily get caught.

Q. Your changes are great, though, right?

A. I don't know whether they are great or slim. I guess it would depend on where you were at for one thing.

Q. How quickly the victim can respond?

A. Well, we figured immediately if he said no; we figured immediately if he said yes.

Q. You testified earlier you went in and you were the first one that pointed that pistol at him, standing across the counter, and said, "Give me your money,"; is that correct?

A. Yes, sir.

Q. And he said no.

A. He didn't say no, he said, "What money?"

[1129] Q. Well, he said, "What money?" what did you say then?

A. I said, "The money in the cash register."

Q. Then you yelled, "Give me your damn money."

A. I didn't yell at him, sir.

Q. Well, you spoke in a voice loud enough for him to hear, didn't you?

A. Like I am talking right now.

Q. No need to talk too loud with a pistol in your hand, is there?

A. You don't need to talk loud for someone to hear you in the first place.

Q. So, you had to ask him for his money on your account at least three times?

A. I didn't ask him for it three times.

Q. How many times did you have to ask him?

A. Once.

Q. So, as soon as you said, "Give me your money," he began to pull it out and give it to you or give it to your friend.

A. Like you said, he said, "What money?" I said, "The money in the cash register." That's not asking for it, that's explaining what money he was talking about.

Q. When did you say, "Give me your damn money."?

A. Right after that. I didn't say, "Give me your damn money." He said, "There's not that much in there." I [1130] said, "I don't give a damn." You know, we weren't looking for a whole lot of money. We needed a little bit of money so we—

Q. But he was trying to put you off, "What money are you talking about?" "The money in the cash register." "Not much in there." "I don't give a damn, give it all to me." How long was this going to go on, do you think, before you made him give you the money?

A. Not long, you know, we was fixing to leave.

Q. If he had said no one more time, y'all were going to walk out the door?

A. I was answering the man's questions that he asked. I mean, you know.

Q. If he had said that there really was not enough money for y'all to worry about, you were going to say, "okay" and walk out?

A. "Well, if you don't want to give it to us, I guess all we can do is leave."

Q. Is that what you were going to do?

A. Yes, sir.

Q. Just turn around and walk through the door?

A. Not turn, but walk to the door, watching to make sure we didn't get shot going out.

Q. Oh, by that pistol he might have under the cash register somewhere?

[1131] A. There could be one in the store somewhere, under the counter or something.

Q. But there was never any intention to hurt anybody was there?

A. No, sir.

Q. Why did you need a gun and a knife?

A. Well, if you just walk into a store with nothing in your hand and tell the man to give you some money, he ain't going to give you nothing.

Q. Well, you had a gun.

A. You asked me why did we.

Q. Why did you need the knife, too?

A. That was what—Henry took his knife in. I guess he wanted to have something.

Q. He needed a knife in his hand with you standing there with a .38 pistol?

A. I can't answer for what my partner thought. I can't answer for no one's thoughts but my own.

Q. The truth of the matter is, you didn't want to get caught, isn't that right?

A. No one wants to get caught.

Q. And how is the best way not to get caught in an armed robbery?

A. To get away.

Q. And how is the best way to get away.

[1132] A. Not to be caught by the police.

Q. And that occurs when you don't leave anybody to call the police, right?

A. No, sir, that occurs when the police do not catch you.

Q. Well, if nobody ever calls the police, doesn't that enhance your chances of getting away?

A. I would say it does.

Q. Don't leave any eyewitness at the crime to call the police. You've got a free ride, right?

A. I would say so but I wouldn't agree to killing anyone. If Henry or David or anyone had said something about killing anybody, I'd not been with them.

Q. In fact, Loftis told you that morning that if you go in there and somebody gets killed, you get the electric chair?

A. No, sir, he did not say that.

Q. Well, what good was this knife going to do Mr. Henry Davis across that check-out counter?

A. I do not know. I guess he just took it in to help persuade the man in opening the cash register. I don't know. I didn't know he had it with him until he pulled it out. I mean, you know.

Q. He carried that knife in his car, didn't he?

A. Yes, sir, but I didn't see him take it out of the [1133] car.

Q. But you did hear him say, "Bend over the counter," didn't you?

A. Yes, sir.

Q. You knew what was going to happen, then, didn't you?

A. I figured he might have wanted the man to lean over the counter, so we could have time to get out of the door without the man grabbing any weapon that he may have had.

Q. Mr. Yates, if you don't mind, step down here just a second.

(Witness goes in front of jury.)

Now, you told your lawyers this is the first time you'd seen this map right here, at a distance, right?

A. Nodded affirmatively.

Q. How about this diagram, did you have an opportunity to go over it yesterday with your lawyers during breaks?

A. I looked at it, yes.

Q. Did you do some figuring on it yesterday, in this courtroom, while we were on a break?

A. I pointed to what I told my lawyers what happened.

Q. Would you go ahead and mark for us, mark "D.Y." exactly where you say you were standing when you fired those shots at Mr. Wood?

A. I don't think I can mark exactly.

[1134] Q. Do the best you can.

(Witness complies.)

A. End of that case somewhere.

Q. So, you were backing up from this position out here?

A. I was headed out toward the door. I was watching out the door.

Q. Your testimony is that there is no question about the fact you were headed out the door and you were at the back of that candy case where you drew that circle?

A. Somewhere in that area, up there somewhere. It is really hard to remember exact positions.

(Witness returns to stand.)

Q. Then, it is not a true statement that after you convinced Mr. Wood to open his cash register, after he had handed the money or at least Davis had the money in his hand and then he handed it to you, Willie Wood backed away, and you walked not toward the back of the store front, but toward Willie Wood, around that cash register so you could draw unobstructed beat on him?

A. No, sir.

Q. Your testimony to this jury about where you were standing up there at the front of the store is truthful?

A. Yes, sir.

Q. When you ran out of that store, you ran and got in the passenger's side, didn't you?

[1135] A. Yes, sir.

Q. Your car was parked just like Dr. Meredith said it was?

A. It was parked like I testified to. I don't remember the exact way he said.

Q. Out there in front of the store?

A. Yes, sir.

Q. Headed south?

A. Yes, sir.

Q. Keys in the ignition?

A. Yes, sir.

Q. Ready to go?

A. Yes, sir.

Q. Jumped in the passenger's side?

A. Yes, sir.

Q. Had that pistol—where was the holster?

A. In my waist.

Q. When you went into that store, you carried the pistol like this?

A. Yes, sir.

Q. In your waistband?

A. Yes, sir.

Q. Did you cover it up?

A. My shirt covered it, yes, sir.

Q. And when you pulled it out, you left the holster in [1136] there?

A. Yes, sir.

Q. You held that pistol in your right hand?

A. Yes, sir.

Q. "Give me your money."

A. Yes, sir.

Q. Looking him dead in the eye?

A. I looked at him, yes, sir.

Q. With the pistol pointed right in his stomach or chest?

A. About his stomach, in his general direction.

Q. Well, you were only a few feet away from him?

A. Yes, sir. Stomach, side of his stomach, something like that.

Q. You jumped in the passenger's side and you had over $3,000 in your hand, didn't you?

A. I had a lot of money, yes, sir.

Q. Had a lot of money, had a pistol, had the hoster?

A. Yes, sir.

Q. When your friend didn't come out of the store, that is when you started running?

A. Yes, sir, I expected my friend to come out of the store.

Q. That's when you got scared?

A. Yes, sir, I figured he got caught.

[1137] Q. What did you tell this jury your state of mind was when you jumped in that car?

A. Frightened, scared. I don't know the exact word to use or whatever, but I had just shot a man. That's the first time I ever shot anybody in my life. I wasn't sure that I had hit him, but he acted like I did. He started down toward the floor. It was real slow, like he was letting himself down.

Q. And you were frightened, upset, right?

A. Yes, sir.

Q. In fact, you were so frightened, you were so upset that you pulled away from there at a high rate of speed, right?

A. Yes, sir.

Q. Trying to escape?

A. Yes, sir.

Q. Avoid detection?

A. Yes, sir.

Q. Avoid apprehension?

A. I was trying to get out of the area, to get away from the police that was sure to be coming.

Q. And your state of mind was in such an upset position that you had the presence of mind to pull down a side road, get out of your car, take the money, the pistol, the holster, put in in a paper bag and walk up into the [1138] wood and place it there?

A. Yes, sir, I was scared when I left, I was scared when I was going into the woods.

Q. That was good thinking wasn't it?

A. I don't know, I didn't want the money and the gun in the car. I didn't even want it near me.

Q. Because that would tie you to the crime, if you got picked up by the police, right?

A. Not only that, but I had blood on the money. I didn't want it.

Q. You didn't want it around because it would tie you to the crime?

A. And the fact that it had blood on it. I didn't want nothing to do with it.

Q. Mr. Yates, as you drove down those country roads, what prohibited you from just tossing it out the window?

A. It would have been found, it might have had my fingerprints on it. Out there, it might have never been found.

Q. Placed it and covered it up with a few pine needles, didn't you?

A. I throw'd a handful on it. I started to cover it up, but I wanted to just get away from there, so I ran back to the car.

Q. Had it placed so later on you could go back and [1139] get it?

A. No, sir, I ain't even sure I could have found the place again. I don't believe I could.

Q. I have no more questions.

MR. MAULDIN: That's the case for Dale.

* * * *

EXCERPT FROM PROSECUTOR'S CLOSING ARGUMENT TO JURY

* * * *

[1169] Under the facts of this case, fate did step in and save Willie Wood's life, through no fault of Mr. Yates. But, in furtherance of that common design, Mrs. Helen Wood was stabbed and bled to death at the hand of Mr. Davis. Mr. Yates is equally guilty. The malice required was in his heart. He pointed a pistol and pulled the trigger. He was bent on murder, and his acts and the acts of Mr. Davis are one and the same, under the law. I submit to you—of course, His Honor is the final arbiter, but you listen to his charge—the hand of one is the hand of all.

Homicide that is committed during the furtherance of that common design, through the first step toward the commission of it, to get out of that car and walk in

that store, both armed with deadly weapons, from that point through everything that happens in the crime until there is a successful escape and the crime is [1170] over with and everybody has left, then it is all over with.

Had the murder of Mrs. Wood taken place at the store out by the gas pump, out on the road, in the post office, wherever it may have happened or could have happened, both are equally guilty, under the law.

The testimony of Mr. Loftis, which was not contradicted, either on cross-examination or by Mr. Yates, himself, was most important. I thought, what showed what was happening with these individuals prior to Helen Wood losing her life: planning, driving around, indiscriminately looking for a victim. Yes, Loftis was part of it or, at least, part of the conversation, but he got out of it, "take me to the Haywood Mall." I thought it was interesting, even Mr. Yates admitted Loftis had the final veto and he vetoed every store every time, because he was the one they said was going in and he wasn't going. "I've been to the penitentiary and you get a lot of time for armed robbery, and if somebody gets killed, you can get the chair. I ain't going in. Let me out." He did get out. What happened after he got out is what we are concerned about today.

How was the Leonard Clarke's store cased out? Differently from the Willie Wood store? Yes. What did they do at Leonard Clarke's? Drive in, slowly, looking [1171] and parked the car near the road. The activities even in the parking lot was such that Leonard Clarke said, "I was suspicious." I told my wife, "Hey, honey, watch out." Who stayed in the car at Leonard Clarke's? The driver and left the motor running. And Yates goes in. What does he see? A handful of people, so he buys two 12-ounce Miller bottled beers. Is that important? It tells you something about his state of mind. It tells you about his mentality. It tells us that he is not, in any way, deranged by anything; that he can remember back and tell you the type of beer he bought, as he described in somewhat detail the events of that entire day.

We move on up to Willie Wood's store. Eileen Stasney testifies. Why is her testimony important? Why should it be so contradicted by the defense? Two reasons: one, Mr. Mauldin told you, when he opened his argument to you, "I am going to prove that Yates never saw Helen Wood." Now he is on the spot. How is he going to prove it? The only thing he can do is have his client, Yates, deny it, "I didn't see her." That doesn't prove anything. Mr. Yates, on the stand, under oath, saying "I didn't see her," that proves it? A man with a criminal record as long as my arm who will steal and break in houses and burn down people's property. He wants you take his word for—

[1172] MR. MAULDIN: Excuse me just a minute, Your Honor, we take exception to that type of argument at this point.

THE COURT: Yes, sir, I overrule the objection. He is talking about the believability of the witness, the credibility of the witness.

SOLICITOR WILKINS CONTINUES WITH ARGUMENT:

Why is it important that you take back to your jury room a belief that he's telling you the truth, that they did not stop there on the side of that store, pass those gas pumps? They'd case it out as they did in other stores. Why? Because it was during that period of time that they were looking, and I am sure they were, they would have seen Mrs. Helen Wood pumping Mrs. Stasney's gasoline. They saw something else. They saw her leave and enter that store, not by the front door, but by the door down by the post office. So, what does that tell us? Somebody else is close by. Somebody is in, I submit to you, the store with a common wall, they thought. If you look at the post office, I guess it is a common wall, with the store they were going to rob. What does that mean? Bam! Bam! is going to be too loud. We don't intend to leave any witnesses in the store.

We can't afford to shoot unless we have to because of the noise it will create. Why else would Mr. Davis carry a knife in that store with him?

[1173] His confederate had a pistol loaded. If you believe him, all they'd say was "Give me your money," and if the proprietor said, "No," they'd turn and walk out. But no, they went, and I submit to you, under the facts of this case, with the idea of stabbing the proprietor to death; a quiet killing, with the pistol as a backup.

Why is that submitted to you? Did they wear a mask? Did they try to conceal their identity? Were they in a real big hurry? Did they, as in the other cases, leave Mr. Davis behind the wheel, like at Leonard Clarke's, with the engine running for a quick get-a-way? No, because it wasn't going to be necessary. Because if you kill quietly, nobody knows, and you can make a successful escape back to Greenville with the greatest of ease.

Willie Wood testified—I guess you are going to have to, somewhat, compare his testimony against Mr. Yates. Willie Wood, the man who works for his living, runs a country store, who is a credit to our community—I guess his country store is really a part of the whole American symbol. He says I was there behind my counter and these two men walked in. Oh, they didn't walk all behind the counters as Mr. Yates said. They didn't get any pepsi colas as Mr. Yates said. "We thought we would get us a pepsi cola because we were [1174] thirsty," just before they committed this armed robbery. No, he said, "One walked straight passed me, and the other walked right up to where my arm was resting on the counter." I think you will remember, his back was to you like this and he held his arm up as he rested on the counter. "I got ready to say, 'What for you?' and I looked up and he said, 'Give me your money'." That was the man across the courtroom from you and me that held that pistol on him. "Give me your money." The first violent words spoken came from the mouth of Mr. Yates, "Give me your money." "I don't give a damn, give me all of your money," or words to that effect.

Then, Mr. Davis joins in, on the other side of the cash register, with a knife in his hand and Willie starts putting the bills out. "Bend over the counter." What does that mean? What does that mean? Pat him on the back and say, "Have a nice day." Stab him in the back is what that means. Kill him quietly. Willie knew what it meant, so he backed back to get away and he's out of range of the knife blade. There is a counter between him and Mr. Davis and he's backing down that counter. What does he say Yates does? Yates moves toward the front door? No! He moves around the cash register, toward him, as he backs away. He looks up and he sees Yates like this and he throws his hands [1175] up, BAM! Didn't hear the second shot, for sure, but we know there was another shot, BAM! Yates tells you a different story. You've got to believe him, not necessarily to find him not guilty but, I submit to you, the attorneys will argue to you, he was trying to get away from all of this criminal conduct, this unlawful design. He was moving toward the front door, trying to get away. Had no intention of harming anyone. He only fired when he heard Davis say, "Shoot him!" And he turned from the front door and shot him.

That is where the angle of the bullet becomes important. The expert, Paul Stombaugh, almost 30 years of experience and 19 of them in a FBI criminal laboratory, over 200 cases involving bullet angulation, testifying as an expert, not only today, but in days passed in this very courtroom, says, "I can tell you the angle of that bullet." Of course, common sense dictates you can't use sunlight to tell you, because once a bullet enters through one panel, the angle, then, can be changed. He drew the angle of that bullet, and it is not just like Willie Wood said. No question about it, but it shows this, without any question, it shows two things: That Willie Wood was moving down from that cash register, away from the cash register, toward the interior of the store, trying to escape that knife.

[1176] It shows another thing, without any question, that Yates, instead of moving toward the door, was moving in the direction that Willie Wood was moving. Moving toward him, as Willie backed up to get a good sight of the other side of the cash register because of the cigarette racks and so forth.

After Yates moved down where he could see Willie Wood, you can see that his friend, Mr. Davis, was not going to be able to kill him quietly, because they were going to leave no witnesses. He did what he thought would accomplish their mission, to take the life of Willie Wood, the only eyewitness as far as they knew. And he thought he had. As you recall, he testified, "When I shot, I saw him start to go down slowly." And he turns and runs and gets in the passenger's side of the car, expecting Mr. Davis to follow him out of the store. But, as you recall from the testimony, Davis is further down into the store, almost to the end, down there by the meat counter. He sees something Yates doesn't see. He sees Willie Wood does not fall all the way. He sees Yates' bullet is not going to kill Willie Wood. So, what does he do? No eyewitnesses. They can be easily identified. Criminal record, mug shots, they know it. So, what does he do? He goes after him to finish the job. Willie does the only thing he can do, [1177] he tries to protect himself and get away from that man coming at him with a knife. He gets to the front of that counter and his windbreaker is on, zipped up, one hand with a bullet hole all the way through it, bleeding profusely, shot in the chest, trying to get his pistol out, to protect himself and his property. And his mother hears something that is not right in the store. His 67-year old mother comes to fight for her son.

As Willie said, they met there and his mother, it appeared, tried to grab Mr. Davis. And Davis, consistent with what the pathologist said, plunged the knife into her chest, sideways, penetrating not only the rib cage, but the heart as well. Willie said that he could see her heart pumping the blood out. He finally has his pistol

out and he backs Davis to the side of the store by the shoe boxes shooting him until he falls.

Mr. Yates is now attempting to make an escape and he's got a lot of presence of mind about him, to get rid of the evidence that will tie me to the crime because something didn't go right. Maybe we did leave an eyewitness there. So, get rid of the money and get rid of the gun and so forth. But he's not just going to chunk it out the window. He's going to keep it. He takes it up to the woods and hides it and covers the [1178] bag in pine needles, comes back out of the woods and sees the wrecker driving down and he stoops down then, trying to conceal himself.

Because of good police work in Greenville County by a sheriff's office, he was apprehended because they did the right thing. They fanned out in a perimeter, watching the major roads. In just a few minutes, in just a few miles, Yates was apprehended.

Is there a reasonable doubt in your mind, Mr. and Mrs. Jurors. The Judge has charged you on this yardstick that you'll have to use. He said reasonable doubt means a real reason, substantial doubt. Can there be not only a substantial doubt, but any doubt as to the guilt of this man in these four indictments. It makes no difference who actually struck the fatal blow, the hand of one is the hand of all. This is the law.

EXCERPT FROM DEFENSE COUNSEL'S CLOSING ARGUMENT TO JURY

* * * *

[1180] It is generally accepted there are several facts that have been proven by the State and conceded by the defense. There are several of these as I am sure you are well aware. Henry Davis, David Loftis, and Dale, all involved in this lifestyle as has been testified to. Mr. Loftis separated himself as some later point and did not participate in the armed robbery, although he talked [1181] about it and discussed, conspired, if you will. He

did not go to the store. He conceived that Dale was in the store and Henry Davis was in the store. Dale participated in the armed robbery and used a gun. He shot Willie Wood. No question about that. Henry Davis went after Willie Wood. No question about that. Henry Davis killed Helen Wood. No question about that. Dale left in the car, at some point, or rather escaped, if you call it that, as has been testified. No question about there.

There are, however, several points as you begin to focus on the important issues of the murder indictment, and I want to draw attention to now. What did Dale agree to do in these cases? He agreed to commit armed robbery. The question you have, did he agree to commit murder? Well, if he had agreed to commit a murder, if there were facts and evidence that tend to show that, I submit to you, along with the other indictments, you would have the indictment for conspiracy to commit murder. No such indictment exists. That should speak for itself. I want you to consider that very strongly. That is part of the requirement you have when you look at the murder indictment of weighing both the mental state and the actions of Dale Yates. What did he think, what did he agree to, are his actions consistent. Are his [1182] actions consistent with armed robbery? Are his actions consistent with murder?

Mr. Wilkins suggests that at some point Henry Davis and Dale intended to leave no live witnesses. Fortunately, we have evidence to view which shows that to be impossible or inconsistent positions. Consider the gun, consider that two shots were fired, consider the uncontroverted testimony that the gun had five bullets. Three live rounds remained. Now, if Dale was the shooter who intended to leave no live witnesses, what would have prevented him from firing the rest of the rounds and being sure there were no live witnesses, or is the fact that there were three live rounds left in the gun consistent with two quick shots and an exit. He left the store while the man was still alive. From Willie Wood's own testimony, he was

standing . . . he was standing behind the counter which you could see over it. If you remember his testimony about the different heights and levels of the counter. You could see over that counter.

There is evidence that suggests that Dale fired in response to the shout of his partner. He was backing up to the doorway. Now, the positions that Dale took inside the store have become a critical importance.

The Solicitor, in his argument, did not use his [1183] exhibit here on the floor chart, which I would like to at this time, if you all can see. Why is this important? Of course, it is important because if the facts tend to show that Dale took two shots and was actually leaving the store, tends to support our position. If, as it is contended, he was standing next to the counter, as states their position.

Now, Willie Wood's testimony was that he was standing—he, Willie Wood, was standing—behind the meat counter, about in the middle of the aisle. Dale Yates, the last time he saw him, was standing right beside the cash register. Dale's testimony places him down at the end of the counter, in this area, and I believe his testimony was he was not exactly sure of the precise spot.

In an effort to clarify this testimony, defense p[illegible]d evidence, common sense evidence, if you will call it that, from our investigator, having been out to the scene and looked at the bullet hole. Our evidence tends to show general support for the angle and position that Dale testified to, not precisely, but approximately.

Now, in reply, mind you, not in the main part of the case, but in reply, this evidence that Paul Stombaugh testified to in discovery, apparently several weeks ago, [1184] did not present until reply, tends to show a line of path it traveled, along this area, along this blue line. Look at that blue line carefully in your deliberations. How can it possibly be consistent with the remainder of the testimony presented by the State. Willie Wood testi-

fied he was here, the line of travel when he was shot was suppose to be here.

We submit that our position on the path of the bullet is as consistent as the testimony is of Willie Wood. We suggest to you that this expert testimony is inconsistent with the rest of the State's case. As far as his relative movements, Dale's relative movements, that is the next point. Got him in the store, fired the shots and what happened next. That is critical to the case. The Judge will charge you the law. What did he do then? What is consistent? What is consistent with all of the testimony? According to Willie Wood, the last time he saw Dale Yates was at "Y-2" on the chart, that was in front of the counter. According to Dale, he fired the shot down closer to the candy case, closer to the door.

Now, it is not inconsistent—It is consistent with Willie Wood's testimony that Dale Yates left in a hurry. Consider that, according to Willie Wood, Henry Davis chased him back d[illegible] the counter, down [1185] this route. If Dale Yates were still in the store, he would have had to have seen him face to face, across the counter. We submit to you the only reasonable explanation was that he was gone at that time. That becomes critical. What I am suggesting to you, you don't have to just accept Dale Yates's testimony, you can accept Willie Wood's testimony, which is consistent with a quick shot, a quick exit.

What did he do then? What did Dale do then? According to his testimony, he got in the passenger's side of the car, waited a few seconds and rode off. According to Dr. Meredith, he saw a man get in the car, wait a few seconds, and ride off. Consistent with the State's own position.

I want to make a comment, a general comment, on the law. The Judge will correct the law at the proper time. Neither Mr. Wilkins or myself are here to give you the law as it is going to be. The Judge will tell you what it is suppose to be in his charge on the law at the proper time. Do not get the impression that every person who is

involved in armed robbery will necessarily be responsible for all consequences, under any circumstances. I submit to you that that is not the law that the Judge will charge you. Each case will stand on its own.

[1186] You may find, for example, that the actions of Henry Davis were done after Dale Yates had left the store. That is an important fact. We submit to you that the evidence does show that. The absence of the State's evidence to the contrary, and the positive evidence testified to by Dale Yates, in addition to expert testimony about the path of the bullet. If that is the case, then there is a difficult decision for you to make as to what his relative responsibility was for the killing of Helen Wood.

The Judge will charge you on murder. The Judge will charge you the law on murder and tell you what murder is in this state. He will tell you about intent. We submit to you that the facts in this case, taken as a whole, indicate that Dale had no intent to kill Helen Wood. The Solicitor has, by implication, I believe, argued that the intent Dale may or may not have had to shoot Willie Wood is there. We don't have any objection to that, no problem with that at all. But the idea that it would apply, that is, that the same intent would apply to the killing of Helen Wood is not the law, we submit.

Henry Davis's actions were separate, distinct, independent, if you will, it was spontaneous; not planned, not agreed, not contemplated. It was not part [1187] of the plan or common purpose of design that Henry Davis and Dale entered into. Henry Davis, in killing Helen Wood, acted alone. It is basic to our principle criminal process. The people are responsible for their acts. It is equally basic that someone not be responsible for other persons' acts. That principle applies in this case. It was interesting to me that Mr. Wilkins mentioned Mr. Mauldin's earlier promise to the jury, that we would prove that Dale never saw Helen Wood. It was a bold promise and I submit to you, under the facts of the case, upon all the

evidence, that it's a relevant issue to the law of the case and it's a promise we have kept.

Thank you very much.

EXCERPT FROM JURY INSTRUCTIONS

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[1200] Ladies and gentlemen, a most important rule of evidence that obtains in this state is this: Any defendant who is charged with the commission of any crime and brought into this courtroom to answer for it is presumed by the law to be innocent, and that presumption of innocence would remain with him throughout the [1201] trial and even when you go to your jury room, and it would remain with him until the State has proven beyond a reasonable doubt that he is, in fact, guilty of one or more of the charges made against him.

I tell you that that burden of proof by the State and by which you must be convinced is made up or consists solely of the evidence which you have heard from that witness stand or exhibits which have been placed before you and which you will have with you in your jury room and, of course, the law as I explain it to you within the context of which the State must prove this guilt beyond a reasonable doubt. It is from evidence and testimony presented in this courtroom that you must be convinced beyond a reasonable doubt, before the presumption of innocence which clothes him from beginning to end of the trial could fall away from him. That is not merely a theory that some lawyer thought of, it is a very substantial right that every citizen in South Carolina is entitled to.

I am confident that when you go to your jury room, you will give this Defendant the benefit of the presumption of his innocence.

Ladies and gentlemen, the burden of proving the charges made against this Defendant rests on the State of South Carolina; in this case, Mr. Wilkins, who is [1202] the Solicitor here and his assistant, Mr. Traxler,

are required by the law, that is, the burden that we are talking about; they are required to present to you evidence, exhibits, by cross-examination of any of the witnesses; they must present before you competent evidence which establishes, beyond a reasonable doubt, the material elements of each of these charges before you could convict the Defendant of any of these charges.

The Defendant does not have to prove that he's innocent. He does not have to disprove that he's guilty. The State must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant.

Ladies and gentlemen, reasonable doubt is a phrase that you have all heard, and it means the same thing in the law as it does in ordinary, everyday English language; that is, a doubt for which you have a real reason. However, that excludes fanciful doubts or whimsical doubts, because anyone could doubt any proposition if you wanted to, but reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason. So, it's to that degree of proof that the State must prove the elements of these charges. When I begin explaining the individual elements to you, bear in mind that it's the State's burden to [1203] establish these to you by that degree of proof which I have just defined.

• • • •

[1206] I tell you that a deadly weapon, within the meaning of the law, is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

Ladies and gentlemen, the State also charges that on February 13th, the Defendant, Dale Yates, committed the crime of murder in Greenville County. Madam Foreman and ladies and gentlemen, murder is the unlawful killing of any human being with malice aforethought, either expressed or implied; that is the definition of murder in South Carolina.

[1207] In order to convict one of murder, the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought, and such proof must be beyond any reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" or "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.

Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an [1208] unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make

a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before a commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be a combination of a previous evil intent and the act which produces the fatal result.

I tell you, however, that the State is not required [1209] to prove any motive for a particular killing.

Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present, participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused [1210] which proximately lead to the accomplishment of the criminal purpose. The commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commis-

sion of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, [1211] nothwithstanding any attempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with a resulting lack of responsibility for a homicide committed by a confederate.

I tell you, however, that withdrawal from the scene of the crime may be considered by you along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

SUPREME COURT OF SOUTH CAROLINA

No. 21835

THE STATE,
Respondent,

v.

DALE ROBERT YATES,
Appellant.

Dec. 23, 1982

PER CURIAM:

Appellant, Dale Robert Yates, was indicted and convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. After being found guilty of murder, the jury recommended at the second phase of the bifurcated trial, that he should die by electrocution. From these convictions and sentence, he appeals. The basic issue involved in the appeal is whether the death sentence should be carried out.

On February 12, 1981, David Loftis (not on trial), Henry Davis (killed in the robbery), and Appellant Yates talked about various places to rob and rode around in the car of Davis looking for a store which could be easily robbed. As a part of the plan, they borrowed a gun from the Appellant's brother. On the following day, February 13, they continued to ride around, casing places to rob. The Appellant and Davis left Loftis (who turned state's evidence) at a shopping mall and drove away with the pistol under the passenger's side of the front seat. The Appellant and Davis subsequently entered Wood's rural

store, by the Appellant's own testimony, for the purpose of committing armed robbery. Appellant was armed with the pistol and Davis with a knife. They demanded and received approximately $3,000 from Willie Wood, who was alone and in charge of the store operation. When Willie Wood failed to cooperate to the satisfaction of the robbers, the Appellant shot him, but not fatally. About that time, the mother of Willie Wood, who was the postmistress in the adjoining building, came upon the scene. The Appellant ran out of the store, taking the money and the gun. Davis remained in the store, and stabbed Mrs. Wood to death with his knife. Willie Wood succeeded in obtaining a gun and killed Davis. After Appellant waited in Davis' car and concluded that Davis had been caught, he drove off, hid the money and pistol in a wooded area, and was later apprehended.

The Appellant testified in his own behalf. His testimony was not inconsistent with the facts recited above. It was his contention that he did not kill Mrs. Wood and that it was his intent all along to abandon the robbery without hurting anybody if the victims refused to cooperate.

The Appellant has stated forty exceptions in quest of a reversal of the convictions and sentence. These exceptions have been argued in the form of twenty questions as included in the Appellant's Brief.

The first three questions submit error on the part of the trial judge in (1) qualifying Volpe, Wallace, Springfield, and Trammell, (2) in excusing certain jurors because of their opposition to capital punishment and (3) refusing to excuse prospective jurors because of their response to *voir dire* questions. We have reviewed the relevant portions of the record dealing with these exceptions and the jurors involved. The interrogations of jurors must be considered as a whole. The qualifications should not be determined on the basis of isolated questions and answers not truly meaningful. The judge must exercise his discretion in qualifying and excusing jurors. We find no error. Certainly, there is no abuse of discretion. Appellant's rights, under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) have not been violated. Principles enunciated in that case have been respected and applied.

Next, Appellant asserts that the trial court erred in denying the motions for change of venue, a change of forum and for additional peremptory challenges. The first two of these are discretionary; peremptory challenges are controlled by statute. We find no showing that this discretion has been abused or that Appellant has suffered from actual juror prejudice. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981). The trial court properly denied these motions.

Early on, we point out that throughout the trial, the prosecuting attorney made it clear that he was not prosecuting the Appellant on the theory of a felony murder. It was his contention that both Appellant Yates and deceased Davis were present aiding and abetting each other in the commission of a planned armed robbery and that the hand of one was the hand of all. The judge charged the law of common law murder applicable in this state.

Appellant argues that the trial court erred in denying his motion to strike armed robbery as an aggravating circumstance. The possibility that Appellant was convicted on a theory of vicarious liability and then sentenced to death based upon the aggravating circumstances of armed robbery which was the foundation of the original murder conviction is asserted by Appellant to be reversible error.

The trial judge in the penalty phase of the trial instructed the jury that the only statutory aggravating circumstance which they were to consider was the murder which was committed while the Defendant was in com-

mission of the crime of robbery while armed with a deadly weapon. This is a statutory aggravating circumstance pursuant to South Carolina Code § 16-3-20(C)(a)(1)(e) (Cum.Supp. 1981). Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder. *State v. Thompson, supra.* The Appellant is equally responsible for the stabbing death of Mrs. Wood, even though he did not actually cast the fatal blows. Appellant and Henry Davis entered the store armed and did commit a robbery. As a direct result of their joint actions in committing the armed robbery, Mrs. Wood was killed.

> That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. *Lockett v. Ohio*, 438 U.S. 586, 602, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978).

There was no error in the trial judge's denying Appellant's motion to strike armed robbery as an aggravating circumstance.

Appellant further argues that the trial court erred in denying Appellant's motion to authorize the spending of certain state funds pursuant to South Carolina Code § 16-3-26(C) for a jury selection expert and for an expert as to the non-deterrent effect of capital punishment.

The decision of the amount of statutory funds to be expended rests in the discretion of the trial judge. This court will not disturb such decisions absent a showing of an abuse of that discretion. Appellant requested a five-hundred dollar fee for a jury selection expert. This expert stated that he would provide his expertise regardless of whether or not the court ordered the payment of his

fee. His services were available in spite of the lower court's refusal to authorize such funds.

We are of the opinion that the trial judge did not abuse his discretion in denying these requests. This statute does not require the trial judge to honor every request made by defense counsel. But only those requests that ". . . are reasonably necessary for the representation of the defendant. . . ." The court is empowered to decide which requests are appropriate. No error.

Appellant asserts that the trial court erred in allowing the Solicitor to express his opinion of the deterrent effects of capital punishment in argument to the jury. In reviewing this argument, as a whole, we find the argument to be within the perimeters permitted by this Court. The Solicitor's argument was acceptable and well within the confines as set forth by the lower court. The trial judge stated before these arguments that both sides would be allowed wide latitude in arguing their respective positions concerning the deterrent effect of capital punishment.

Appellant challenges the trial court's refusal to enjoin the Solicitor from seeking the death penalty in his case. Appellant based this challenge on the prosecutor's record of handling previous death penalty cases involving triggermen and non-triggermen. A triggerman is the person who actually fires the fatal shots or uses the deadly weapon to cause a death. Appellant argues that the Solicitor normally sought the death penalty only against the triggerman.

It would be error for the trial judge to tell a Solicitor how to determine whether the death penalty should be sought. This is the prerogative of the Solicitor. The exception is without merit.

Appellant's motion seeking to prevent pre-trial press coverage of the preliminary hearing was properly denied by the magistrate in question. Appellant has failed to

show any actual prejudice by the press coverage or the magistrate's handling of this one limited purpose phase of the trial.

The trial judge's finding of ". . . fact beyond any reasonable doubt that this defendant is competent to stand trial . . ." is well supported by ample evidence before the lower court. Appellant's exception as to his competency to stand trial is without merit.

Appellant asserts that it was error for the trial court to deny his request for separate juries in the guilt and penalty phase of the trial. Also, it was error to excuse potential jurors who were opposed to the death penalty. The death penalty statute in South Carolina does not contemplate or provide for two separate juries in such a trial. This court has resolved the issue of disqualifying jurors who oppose the death penalty adversely to the Appellant in *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) and *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980).

When Appellant was testifying in his own behalf, the State, at cross-examination, was allowed for purpose of impeachment to introduce Appellant's prior criminal record as follows: two indictments involving house-breaking and larceny; four indictments charging the crime of larceny; and four indictments charging arson. It is uncontested that the house-breaking and larceny charges were appropriate. Appellant urges, however, that the court erred in allowing in evidence the four charges involving arson. They involved the burning of three barns and a hut. All of these were relevant on the credibility issue. Offenses involving moral turpitude are permitted but those not involving moral turpitude should be excluded. Whether a particular offense constitutes a crime of moral turpitude has been developed in South Carolina on a case by case basis as a matter of common law. The traditional definition of moral turpitude is:

> . . . an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. . . . *State v. Horton*, 271 S.C. 413, 248 S.E.2d 263 (1978)

We hold that arson involves an act of baseness, vileness and depravity. Grand larceny is beyond question an offense involving moral turpitude. There is involved the usurpation of another's personal property with intent to commit it to the use of the taker. Arson, like vandalism, is, in many senses of the word, more reprehensible. It involves the destruction of the property of another with not only the intent to deprive the true owner of its use but to also deprive any other person of its use and benefits. We hold that the trial judge correctly admitted the conviction of arson for the limited purpose of impeaching the witness.

Appellant requested by way of discovery an out of court statement made by Willie Wood. The trial court obtained a copy of this statement and advised Appellant's counsel: "I'll give it to you if you need it." The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with the indictment and trial testimony. The Appellant was not deprived of information of which he was not already aware and which was actually available to him.

Appellant argues that the lower court erred by failing to direct a verdict for Appellant as to the murder count. We disagree. The evidence must be viewed in light most favorable to the State and any evidence, direct or circumstantial, reasonably tending to prove guilt of the accused, creates a jury issue. *State v. Hall*, 268 S.C. 390, 395, 234 S.E.2d 219, 221, *cert. denied*, 434 U.S. 870, 98 S.Ct. 211, 54 L.Ed.2d 147 (1977).

Appellant and Henry Davis planned and jointly executed an armed robbery. The Appellant was armed at the time of the robbery with a pistol which he used to shoot Mr. Wood, from whom money was taken. Appellant drove away only after he (Appellant) thought Davis had been caught. Meanwhile, Davis had stabbed Mrs. Wood to death.

"One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Woomer*, 276 S.C. 258, 277 S.E.2d 696 (1981). *State v. Hicks*, 257 S.C. 279, 284, 185 S.E.2d 746, 748 (1971). South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), citing *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946). The evidence made a jury issue as to the murder charge.

Appellant asserts as error the trial judge's refusal to charge the state's request number 3, concurred in by the Appellant, which set forth a theory of felony murder. As stated above, the state did not proceed on the felony murder theory. The proposed charge was not a correct statement of the law applicable to the present case. The trial judge must determine the law to be charged from the evidence presented. *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). We are of the opinion that the trial judge correctly and precisely determined the applicable law and charged it.

The Appellant requested the trial judge to charge the jury as a mitigating circumstance: "That Dale Robert Yates did not kill the victim Helen Wood." This request was made incident to the penalty phase charge of the bifurcated trial after Appellant had already been convicted of murder. The judge very properly told counsel, in lieu of granting the request, "you may argue it [to the jury]

all you wish to." Presumably, counsel did exactly that. The fact that Yates did not do the stabbing personally was one of the facts upon which counsel relied in hopes of obtaining a life sentence. Instead of charging the jury in the language suggested by counsel, the judge submitted a charge which was reduced to writing and taken to the jury room, as required by the code, which reads as follows:

> Secondly, the Defendant asks you to consider that the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor. In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow.

The charge, first orally and then in writing, to the jury, let it know that it should give consideration to the fact that Yates did not personally stab Mrs. Wood. The thought counsel wished the judge to convey was actually given to the jury, although not in the exact verbiage requested. We find no error.

The next issue submitted to the Court involves the application of a portion of § 16-3-20(C) (Cum.Supp. 1981), which reads as follows:

> Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment.

After the jury had deliberated for approximately fifty minutes whether the Appellant should receive a life sentence or a death sentence, the foreman reported that the

jury was deadlocked. The judge, in a brief statement, said: ". . . I would not conclude that after the length of time which you have deliberated that you have given due and thorough deliberation to the matter before you, and I am going to ask you to return to the jury room and continue your deliberations." The jury complied and returned approximately two and one-half hours later with a verdict recommending the death penalty. Appellant contends that the trial judge should have told the jury that if it was not capable of breaking the deadlock, the court would impose a life sentence. This same issue was before this Court and was settled in *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981). The words of the Court are equally applicable here. We said:

> The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

The last questions raised by the Appellant call upon this Court to perform the duty imposed upon it by § 16-3-25(C) of our Code. In addition to the traditional alleged errors of law which the Court must rule upon, the statute imposes upon the Court, the duty to

> . . . [C]onsider the punishment. . . .
> . . .
>
> (C) With regard to the sentence, the court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

It is the contention of the Appellant that this Court should vacate his death sentence because it was influenced by passion, prejudice and arbitrary factors and that the sentence of death was excessive or disproportiate to the penalty imposed in similar cases when both the crime and the defendant are considered. We discussed the duty of the Court under the statutory requirements in the case of *State v. Copeland, et al.*, 278 S.C. 572, 300 S.E.2d 63 (1982), to which reference is made. While the duty imposed is a difficult one because no two defendants and no two crimes are exactly alike, it is not an unsurmountable chore. Prior to imposition of sentence, the trial judge, who heard the entire case, made this finding:

> Mr. Yates, as the trial judge in the case just concluded in which you are indicted for the crime of murder, prior to imposing the death sentence upon you, I find as an affirmative fact beyond any reasonable doubt that the evidence warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor.

The totality of the record abundantly supports the trial judge's finding. We agree that the evidence warrants the death penalty and our independent finding and conclusion is that the penalty was not the result of prejudice, passion or any other arbitrary factor.

The Appellant emphasizes more particularly his contention that the sentence is disproportionate to penalties imposed in similar cases. He argues that he personally

did not stab and cause the death of Mrs. Wood. He testified during the trial that at the time of her death he was not in the store but had departed to the getaway car.

While the case of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) had not been decided at the time of the trial, it has been argued orally and we consider it in the light of Appellant's reliance upon it. In *Enmund*, Sampson and Jeannette Armstrong went to the backdoor of the house of Thomas and Eunice Kersey. Sampson Armstrong grabbed Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Sampson Armstrong, and perhaps Jeannette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, took their money and fled. Enmund was at that time in a parked car approximately two hundred yards from the house. He was the getaway man. After the Supreme Court of Florida affirmed Enmund's conviction of murder and his death penalty, the Supreme Court of the United States granted *certiorari* to determine ". . . whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life nor intended to take life." The gravamen of the holding that Enmund's death penalty was impermissibly excessive under the Eighth Amendment of the United States Constitution is to be found in the following language of the Court:

> Here the robbers did commit murder, but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we in-

sist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U.S. 586, 605 [98 S.Ct. 2954, 2965, 57 L.Ed.2d 973] (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U.S. 280, 304 [96 S.Ct. 2978, 2991, 49 L.Ed.2d 944] (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

. . . .

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

. . . .

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judg-

ment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

The difference between the culpability of Enmund and the culpability of the Appellant is readily apparent. The culpability is different because the degree of participation was different. Enmund expected the Armstrongs to rob the Kerseys, bring the money to the car and that all would depart. On the other hand, Appellant Yates possessed the more potent weapon, a gun, and failed to kill Willie Wood merely because his aim was less than perfect. It is of little significance that the life he intended to take and attempted to take was that of Willie Wood instead of his mother, who was actually stabbed. We have no difficulty in differentiating the case at hand from that of *Enmund*.

There can be no serious doubt but that the evidence cited hereinabove together with the remainder of the record, amply supports the jury's findings of a statutory aggravating circumstances as enumerated in § 16-3-20 of our Code. Section 16-3-20(C)(a) defines one of the aggravating circumstances as follows:

> (1) Murder was committed while in the commission of the following crimes or acts:
>
> . . . (e) robbery while armed with a deadly weapon, . . .

This aggravating circumstance was proven by the Appellant's own testimony. There are no offseting mitigating circumstances of consequence.

In determining whether or not the sentence here imposed is excessive or disproportionate in light of the crime and the defendant, this Court has reviewed the entire record. We have also considered the circumstances of *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179, *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 863, the only

prior holding of this Court suitable for comparison. In that case, the two defendants, Gilbert and Gleaton, spent a morning cruising in search of a target to rob. The same preclude to crime also appears in the record of *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458, rehearing denied 457 U.S. 1112, 102 S.Ct. 2917, 73 L.Ed.2d 1323. In the instant case, appellant with Davis and Loftis apparently contemplated robbery for over a day, making a diligent search of Greenville County for just the right setting. Indeed, Loftis, one of the accomplices, withdrew from the enterprise before the actual robbery and testified to this lengthy prologue.

As in *Gilbert*, *supra*, Appellant and his cohort, Davis, found a solitary, apparently unarmed victim in Mr. Willie Wood. In almost every respect, the robbery unfolded as in the case of Gilbert and Gleaton with one assailant wielding a knife and the other a pistol. Mr. Wood was directed to lean over the store counter by Davis who appeared ready to stab him with the knife. At this point, however, the victim refused to obey. At Davis' command, the Appellant fired two bullets at Wood from close range and fled. From this a jury could conclude beyond a reasonable doubt that Appellant fully intended Wood's death, either by Davis' hand or his own, in the course of this armed robbery.

Hereafter the facts diverge from our previous cases. Mr. Wood did not die from his wound but instead seized his own gun and fought off Davis. Willie Wood's sixty-eight year-old mother then came upon the scene and was stabbed to death by Davis, who in turn was shot and killed by Wood. Although this outcome sets the instant case apart from previous capital sentences we have affirmed, it is sufficient for our purposes that the Appellant displayed the same intent and followed the same pattern of preparation as Gilbert, Gleaton and Thompson before him.

In mitigation, Appellant offered his own testimony and that of his mother. The jury learned that Appellant had been a poor student in school, achieving basically a ninth grade education. In Appellant's own words, he was more interested in "getting out and having fun, shooting pool." If given a life sentence, however, he intended to write a book, study, and improve the prison system. Appellant frankly conceded that he had not managed to do these things during ten previous periods of incarceration. Both Appellant and his mother testified generally that he had some history of drug abuse and that, most importantly, he allowed himself to be influenced by Davis, the deceased accomplice. Appellant did not contend, however, that he was actually inebriated at the time of the robbery nor that Henry Davis forced him to participate.

The trial judge meticulously instructed the jury on the available circumstances under § 16-3-20(C)(b)(1), (4), (5) and (7). In addition, the trial court orally and in writing directed the jury to consider any other mitigating circumstances presented by the defendant.

In our view, the Appellant had the benefit of every reasonable explanation for his acts. We are satisfied that the jury properly found the aggravating circumstances of robbery while armed with a deadly weapon and did so without any influence of passion, prejudice or other arbitrary factor. The testimony in mitigation is comparable to that in *State v. Gilbert*, *supra*, if not somewhat less impressive, given the claim of Gilbert and Gleaton that they had partaken of drugs and were acting solely on impulse. We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. Given that we have upheld a comparable sentence in the comparable case of *State v. Gilbert*, *supra*, we are confident that the finding of this jury represents consistent application of the ultimate sanction in this category of capital crime.

As indicated hereinabove, Appellant has filed forty exceptions in quest of a reversal. Many have not been argued and some have admittedly been abandoned. Issues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed prejudicial error; we find none. The convictions and sentence of the Appellant, Dale Robert Yates, are, accordingly,

AFFIRMED.

THE SUPREME COURT OF SOUTH CAROLINA

[Title Omitted in Printing]

ORDER

Dale Robert Yates has petitioned this Court for a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief.

After careful consideration of this petition, we are of the opinion it should be denied.

We have also considered the petition for writ of habeas corpus and conclude it should be denied.

/s/ Bruce Littlejohn, C.J.
For the Court

Columbia, South Carolina

May 22, 1985

SUPREME COURT OF THE UNITED STATES

No. 85-5193

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Supreme Court of South Carolina for further consideration in light of *Francis* v. *Franklin*, 471 U.S. —— (1985).

October 15, 1985

SUPREME COURT OF SOUTH CAROLINA

No. 22614

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

Heard March 26, 1986

Decided Sept. 29, 1986

NESS, Chief Justice:

This case is before us on remand from the United States Supreme Court for reconsideration of Yates' petition for writ of habeas corpus. The petition is denied.

Yates was convicted of murder and armed robbery in 1981 and was sentenced to death upon recommendation of a jury. This Court affirmed the conviction and sentence. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. den., 462 U.S. 1124, 103 S.Ct. 3098, 77 L.Ed.2d 1356 (1983). Yates' application for post conviction relief was denied, and he sought a writ of certiorari from this Court to review the decision of the circuit court. Yates also filed a petition for writ of habeas corpus in the original jurisdiction of this Court alleging, for the first time, constitutional error in the jury instructions at trial. The petitions were consolidated and both were denied by summary order. The United

States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). *Yates v. Aiken*, —— U.S. ——, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

At Yates' trial the jury was instructed that malice is presumed from the use of a deadly weapon. No objection to the charge was made, and the issue was not raised on direct appeal. Approximately one year after Yates' conviction was affirmed, this Court found error in a similar malice charge. *State v. Elmore*, 279 S.Ct. 417, 308 S.E.2d 781 (1983). The jury instruction at Yates' trial suffered from the same infirmities present in *Elmore* and addressed in *Francis v. Franklin, supra.*

The question we must resolve is whether *Elmore* may be applied retroactively to invalidate a conviction which was final at the time *Elmore* was decided. We have expressly stated that *Elmore's* retroactive effect is limited to cases pending on direct appeal at the time that case was decided and will not apply to collateral attacks on criminal convictions. *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985). In light of the remand of this case, however, we take this opportunity to re-evaluate and expand on our holding in *McClary.*

Decisions from the United States Supreme Court regarding retroactive application of new rules of criminal law are a mass of confusion. Indeed, that Court has noted that the development of the law of retroactivity is "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 2584, 73 L.Ed.2d 202 (1982), citing *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 1172, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring). In applying those precedents at the state level to determine the retroactive effect of a prior state decision, one factor is controlling. "Retroac-

tive application is not compelled, constitutionally or otherwise." *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). *See also, United States v. Johnson*, 102 S.Ct. at 2583, citing *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); ["'The Constitution neither prohibits nor requires . . . retrospective effect' be given to any 'new' constitutional rule."]; and citing *Great Northern R. Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ["'the federal constitution has no voice upon the subject' of retrospectivity."] In the absence of constitutional mandate, this Court is free to determine our own standards regarding retroactivity of state decisions.

While not binding on us, several of these decisions are instructive on the issue of retroactivity.

Prospective application should be afforded a new rule of criminal procedure which is a "clear break" from earlier precedent. *United States v. Johnson*, 102 S.Ct. at 2587, citing *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). *See, e.g., Batson v. Kentucky*, —— U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (White, J., and O'Connor, J., concurring in separate opinions; Burger, C.J., and Rehnquist, J., dissenting). *See also State v. Hawkins*, South Carolina Supreme Court Order dated June 6, 1986 [applying *Batson v. Kentucky* prospectively from the date of the decision.] Full retroactivity, even by collateral attack, should be permitted when a ruling establishes that the trial court's action is void *ab initio* or that defendant's conduct was not subject to criminal punishment. *United States v. Johnson*, 102 S.Ct. at 2587, and cases cited therein. The gray area between these two bright line rules has resulted in the majority of litigation on this issue.

We are persuaded by Justice Harlan's view that a new rule of criminal law which does not fall into one of the

categories discussed above should be applied retroactively to all cases pending on direct review at the time the new decision is issued. *See, Desist v. United States, supra* (Harlan, J., dissenting); *Mackey v. United States, supra,* (Harlan, J., concurring) [adopted in *United States v. Johnson, supra,* as to new decisions arising under the Fourth Amendment.] *See also, Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38, citing *United States v. Johnson*, 102 S.Ct. at 2594. This rule is, of course, subject to traditional standards of waiver and harmless error.[1] *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38 (1985) at footrote 4; *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

Justice Harlan's view has several advantages. Retroactive effect of a new rule is appropriate when the purpose of the new rule is to "enhance the accuracy of criminal trials." *Solem v. Stumes*, 104 S.Ct. at 1342. On one hand, the Harian approach avoids the problem of the Court becoming a "super-legislature," picking one case at random in which to announce a new rule, "then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule." *Shea v. Louisiana*, 105 S.Ct. at 1069. On the other hand, it prevents the illogical result of reversing, on collateral review, a decision on the basis of a rule of law which did not exist at the time the case was finally decided. *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977) (Powell, J., concurring).

Accordingly, we adhere to our decision in *McClary* that the retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided. Collateral attack of a criminal conviction on the

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[1] *See also, Rose v. Clark*, —— U.S. ——, 106 S.Ct. 3101, 92 L.Ed. 2d 460 [applying harmless error analysis in a collateral attack (habeas corpus) on an unconstitutional jury instruction without addressing the issue of retroactivity].

basis of legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction.

We realize that many factors affect the progress of a case through the judicial system, and the speed of appellate review will necessarily differ from case to case. Even under our view of the scope of retroactivity, it may be inevitable that some similarly situated defendants will be treated differently. *United States v. Johnson*, 102 S.Ct. at 2591, footnote 17. However, we believe our approach is less likely to result in inequitable treatment among similarly situated individuals than is the approach applied by the federal courts. "The disinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come." *Shea v. Louisiana*, 105 S.Ct. at 1070.

While we affirm Yates' conviction, we raise, *sua sponte*, the propriety of Yates' death sentence in light of the United States Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.E.2d 1140 (1982). In that case, the Supreme Court held the Eighth Amendment forbids the imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 3376. *See, State v. Peterson & Stubbs*, 287 S.C. 244, 335 S.E. 2d 800 (1985). Rather than remanding this case for a new sentencing proceeding, this Court may make its own review of the record to determine the factual questions raised by *Enmund*. *Cabana v. Bullock*, —— U.S. ——, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). See also *State v. Patterson*, 285 S.C. 5, 327 S.Ed.2d 650 (1984).

Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood, and entered the store.

Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood, who was standing behind the store counter. Yates demanded money. Wood hesitated, and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed. He learned of their deaths after his arrest.

Yates was found guilty of the murder of Mrs. Wood under the theory of the "hand of one, hand of all." When two or more persons aid, abet and encourage each other in the commission of a crime, all being present, each is guilty as a principal. *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971).

Enmund does not prevent a conviction of murder against one who did not actually take life. It does not "affect the state's definition of any substantive offense, even a capital offense." *Cabana v. Bullock*, 106 S.Ct. at

696, citing *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984). Rather, its holding relates solely to the imposition of the death penalty upon one already convicted of murder as the state defines that offense.

We have little difficulty in finding that Yates attempted to kill and intended that life be taken. He attempted to kill Wood by shooting him in the chest. Even though the ultimate victim was someone other than the person Yates attempted to kill, Yates' intent is not diminished in any way. *State v. Gandy*, 283 S.Ct. 571, 324 S.E.2d 65 (1984). Therefore, Yates' death sentence is appropriate under the holding of *Enmund v. Florida.*

The petition for writ of habeas corpus is

DENIED.

GREGORY, HARWELL and CHANDLER, JJ., concur.

FINNEY, J., dissents in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, the doctrine of retroactivity should not prevent this court from reviewing constitutional issues or court decisions affecting the truth-finding process when raised in collateral proceedings.

The majority opinion concludes that *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985) and *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985), support the concept of a limitation on the doctrine of retroactivity in the application of the principles enunciated in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), to those cases pending on direct appeal. The majority's attempt to distinguish between direct and collateral challenges in the application of the doctrine of retroactivity is, in my opinion, misplaced in cases where the alleged error affects the truth-finding function and particularly in those cases where the state seeks the ultimate punishment.

The majority justifies its distinction on the need to draw "the curtain of finality," citing *McClary v. State, supra*, and *Shea v. Louisiana, supra.* I would respectfully point out that neither *McClary* nor *Shea* was a death penalty case; and under South Carolina law in death penalty situations, we are required to conduct in favorem vitae review. The majority apparently overlooks or minimizes the finality of its decision in this case—death—where there is a strong possibility that the conviction was constitutionally infirm. The concern for finality that might otherwise dictate non-retroactive review of constitutional decisions on collateral attack should not override constitutional considerations in the instant case.

In *State v. Elmore, supra*, this court held that a presumption of malice from the use of a deadly weapon erroneously constituted a mandatory presumption rather than a permissive inference. In *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), this court found that such mandatory presumption is prejudicial and constitutes reversible error. These two decisions are in line with the decision of the Supreme Court of the United States, holding that erroneous instructions regarding a necessary element of an offense such as malice substantially impairs the truth-finding functions of the jury. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

In *McClary v. State, supra*, the Supreme Court of South Carolina held that retroactive application of *State v. Elmore*, will be limited to those cases pending on direct appeal and will not apply to collateral attacks on criminal convictions. Prior to *McClary*, the Court allowed review of *Elmore*-type errors retroactively in *State v. Woods, supra, State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983), and *State v. Llewellyn*, 281 S.C. 199, 314 S.Ed.2d 326 (1984). A reading of *McClary* shows that this court based its decision upon its understanding

of *Shea v. Louisiana*, *supra*, whose reasoning the court adopted and presumably accepted as binding precedent. I would point out that the Supreme Court of the United States, in *Shea*, was concerned with a non-truth-finding error, whereas the error complained of in this case is clearly a truth-finding error.

The principles of retroactivity set forth in *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed. 2d 202 (1982); and *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), provide a rational framework for applying new constitutional decisions retroactively. These decisions recognize that complete retroactive effect should be given, even when raised by collateral proceedings, to new constitutional rules whose major purpose is to overcome an aspect of the criminal trial that substantially impairs the truth-finding function and raises serious questions about the validity of guilty verdicts. This pronouncement of retroactivity is made particularly clear in *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), wherein the United States Supreme Court held:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

See also *United States v. Johnson*, *supra*, and *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

The doctrine against burden shifting presumptions set out in *Francis v. Franklin*, *supra*, is not a clear break with prior law. The United States Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's

requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury.

I also dissent because the majority, *sua sponte*, addresses the question of the propriety of Yates' death sentence in light of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and without the benefit of briefs, oral arguments or consideration of any differences between Florida and South Carolina law dealing with the responsibility of persons who did not actually inflict the mortal wound, concludes that the death sentence was appropriate, relying upon *Cabana v. Bullock*, —— U.S. ——, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), and *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), both of which are easily distinguishable.

I would reconsider and remand this case to the trial court for a new trial.

SUPREME COURT OF THE UNITED STATES

No. 86-6060

YATES

v.

AIKEN, WARDEN, *et al.*

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Argued December 2, 1987—Decided January 12, 1988

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store, a fight occurred in which the accomplice and the storekeeper's mother were both killed. Petitioner was convicted of murder and armed robbery and sentenced to death. His conviction and sentence were affirmed by the South Carolina Supreme Court in 1982. *State* v. *Yates*, 280 S. C. 29, 310 S. E. 2d 805 (1982), cert. denied, 462 U. S. 1124 (1983).

At his trial, petitioner testified that the decedent had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon."[1] A few months after petitioner's conviction was affirmed, the South Carolina Supreme Court held that it was error to give such an instruction. See *State* v. *Elmore*, 279 S. C. 417, 308 S. E. 2d 781 (1983). Thereafter, petitioner sought a writ

[1] See App. 7; Tr. 1208.

of habeas corpus from the South Carolina Supreme Court, arguing that the burden-shifting instruction given at his trial was unconstitutional under the state court's reasoning in *Elmore* and under our decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). While the application for habeas corpus was pending, we decided another case involving a burden-shifting instruction, *Francis* v. *Franklin*, 471 U. S. 307 (1985), and petitioner promptly called that decision to the attention of the State Supreme Court. The court denied the writ without opinion.

Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of *Francis* v. *Franklin*." *Yates* v. *Aiken*, 474 U.S. 896 (1985). On remand, the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in *Elmore* and addressed in *Francis* v. *Franklin*." 290 S. C. 231, 233, 349 S. E. 2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in *Elmore* should not be applied retroactively to invalidate a conviction that was final when *Elmore* was decided. The opinion did not consider whether the decision in *Francis* v. *Franklin* might apply retroactively and also did not discuss our decision in *Sandstrom* v. *Montana*, on which petitioner had relied.

In dissent, Justice Finney reasoned that *Elmore* and *Francis* v. *Franklin* should be applied retroactively because an instruction that shifts the burden of proof on an element of the offense—particularly in a capital case—substantially impairs the truth-finding function of the jury. Moreover, he reasoned, given our decision in *Sandstrom* v. *Montana* in 1979, the case did not represent a significant change in the law.[2]

[2] "The doctrine against burden shifting presumptions set out in *Francis* v. *Franklin*, [471 U.S. 307 (1985)], is not a clear break

We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our mandate. 480 U.S. 945 (1987). We now reverse.

I

Our order remanding the case for further consideration in the light of *Francis* v. *Franklin* was predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question. Our opinion in *Francis* explained why a challenge of this kind is supported by the Federal Constitution:

> "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship*, [397 U.S. 358, 364 (1970)]. This 'bedrock, "axiomatic and elementary" [constitutional] principle,' *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom* v. *Montana*, *supra*, at 520-524; *Patterson* v. *New York*, 432 U.S. 197, 210, 215 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684, 698-701 (1975); see also *Morissette* v. *United States*, 342 U.S. 246, 274-275 (1952). The

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with prior law. The United States Supreme Court in *Sandstrom* v. *Montana*, 442 U.S. 510 . . . (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury." 290 S. C., at 239, 349 S. E. 2d, at 88-89.

> prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S., at 372. See *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958)." 471 U.S., at 313.

The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm for the reasons "addressed in *Francis*" was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not. Our mandate contemplated that the state court would consider whether, as a matter of federal law, petitioner's conviction could stand in the light of *Francis*. Since the state court did not decide that question, we shall do so.

II

The South Carolina Attorney General submits that we should adopt Justice Harlan's theory that a newly announced constitutional rule should not be applied retroactively to cases pending on collateral review unless the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Mackey* v. *United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part), or enunciates a procedural rule that is "implicit in the concept of ordered liberty," *id.*, at 693. Under this theory, the Attorney General argues, petitioner would not be entitled to the benefit of our ruling in *Franklin*.

We have already endorsed Justice Harlan's retroactivity analysis for cases pending on direct appeal, see *Griffith* v. *Kentucky*, 479 U.S. 314 (1987) [107 S. Ct. 708, 713]; *United States* v. *Johnson*, 457 U.S. 537 (1982), and we have noted, as Justice Harlan did, *Mackey*, *supra*, at 682-687; *Desist* v. *United States*, 394 U.S. 244, 260

(1969) (Harlan, J., dissenting), the important distinction between direct review and collateral review. Compare *Allen* v. *Hardy*, 478 U.S. 255 (1986) (holding that *Batson* v. *Kentucky*, 476 U.S. 79 (1986) does not apply retroactively to cases on collateral review), with *Griffith*, *supra*, at 322-323 (holding that *Batson* does apply retroactively to cases pending on direct review); see, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (right to appointed counsel on direct appeal not applicable in collateral proceedings). To decide this case, however, it is not necessary to determine whether we should go further and adopt Justice Harlan's reasoning as to the retroactivity of cases announcing new constitutional rules to cases pending on collateral review.

Although Justice Harlan believed that most collateral attacks on final judgments should be resolved by reference to the state of the law at the time of the petitioner's conviction, he emphasized the proposition that many "new" holdings are merely applications of principles that were well settled at the time of conviction. As he explained in *Desist:*

> "The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." 394 U.S., at 263-264.

This reasoning, which we previously have endorsed,[3] is controlling in this case because our decision in *Francis* was merely an application of the principle that governed our decision in *Sandstrom* v. *Montana*, which had been decided before petitioner's trial took place. We explicitly so held in *Francis* itself:

> "The question before the Court in this case is almost identical to that before the Court in *Sandstrom*: 'whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of . . . state of mind,' 442 U. S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense." 471 U. S., at 313.
>
> "*Sandstrom* v. *Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. 442 U. S., at 521. Today we reaffirm the rule of *Sand-*

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[3] We stated in *United States* v. *Johnson*, 457 U.S. 537, 549 (1982):

> "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

See also, *Truesdale* v. *Aiken*, 480 U.S. 527 (1987) *(per curiam)*; *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Lee* v. *Missouri*, 439 U.S. 461, 462 (1979) *(per curiam)*.

strom and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed." *Id.*, at 326-327.

III

The Attorney General also argues that South Carolina has the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding. We reject this argument for two reasons. First, as we have just explained, *Francis* did not announce a new rule. Second, we do not read the South Carolina Supreme Court's opinion as having placed any limit on the issues that it will entertain in collateral proceedings. Since it has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

DALE ROBEPT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL, SOUTH CAROLINA,
Respondents.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Opinion No. 22962

Submitted June 6, 1988—Filed February 6, 1989

PETITION DENIED

GREGORY, C.J.: This case is before us on a petition for writ of habeas corpus. We deny the petition.

In 1981 petitioner was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. He was sentenced to death. The convictions and sentence were affirmed on appeal to this Court. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983).

Petitioner's subsequent application for post-conviction relief was denied by the circuit court in 1984. He then

petitioned this Court for review of that denial by way of writ of certiorari. He simultaneously petitioned for habeas corpus relief on the ground the trial judge's charge on implied malice was improper under state law [1] and under *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*. *Yates v. Aiken*, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

On remand this Court clarified the denial of the petition under state law.[2] *Yates v. Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986). Dissatisfied with this Court's disposition under *Francis v. Franklin*, however, the United States Supreme Court reversed the denial of the petition for habeas corpus. *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It held *Francis v. Franklin*, which condemns a mandatory presumption regarding proof of an element of the crime, applies retroactively to cases pending on collateral review because it merely reiterates the principles announced in the 1979 decision of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] This case was again remanded for further proceedings consistent with the Supreme Court's opinion. 98 L.Ed.2d at 554.

[1] Petitioner argued that under *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in *State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2] We held retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided and does not apply to collateral attacks. *See McClary v. State*, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3] We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under *Sandstrom* on direct appeal in state court. *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); *cf. Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980) (wherein petitioner in *Francis v. Franklin* raised mandatory presumption issue under *Sandstrom* in state court). Of course, we are constrained to accept the high court's mandate that *Francis v. Franklin* applies here.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

In *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court held jury instructions that violate *Francis v. Franklin* are subject to a harmless error analysis. The reviewing court must determine whether on the whole record the erroneous mandatory presumption is harmless beyond a reasonable doubt. 92 L.Ed.2d at 474. The pertinent inquiry is whether the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption. *Id.* Such an inquiry requires us to review the trial judge's charge and the facts of this case in the context of the malice element of the offenses charged.

We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered

Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972); *State v. Gilbert*, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on the theory of accomplice liability.[4]

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict

[4] To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

that petitioner is guilty of murder under a theory of accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. *Rose v. Clark*, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the jury: "malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon . . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S. C. Code Ann. § 16-3-10 (1985). In the context of accomplice liability for murder, the element of malice which must be proved by the State is that of the *killer*. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or

implied. *State v. Hinson*, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

Pursuant to *Rose v. Clark* and based on our exhaustive review of the record, we hold any error under *Francis v. Franklin* is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder.

The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In 1983, this court held that it was error for a trial judge to instruct a jury in a case that malice is mandatorily presumed from the use of a deadly weapon. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Prior to our decision in *Elmore*, we had affirmed Yates' conviction on direct appeal. [*State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982)] and summarily denied his petition for a writ of certiorari.

In 1985, the United States Supreme Court reversed a murder conviction and death penalty sentence in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), holding that where the accused's only defense is that he did not have the required intent to kill, an instruction that intent is presumed from the use of a deadly weapon is error and cannot be considered harmless.

Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in *Francis v.*

Franklin. See, *Yates v. Aiken*, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in *State v. Elmore, supra*, and *Francis v. Franklin*. We, however, declined to apply the *State v. Elmore* standard retroactively. *Yates v. Aiken*, 290 S.C. 231, 349 S.Ed.2d 84 (1986). The retroactive application of *Francis v. Franklin* and the application of *Sandstrom v. Montana* was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in *Francis*' was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of *Francis*, the Supreme Court analyzed the issue of the retroactivity of *Francis v. Franklin* to foreclose any further analysis by this court. The Court held that *Francis v. Franklin* was merely a reaffirmation of its holding in the 1979 *Sandstrom* opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under *Francis v. Franklin*. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of *Francis*, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding *Yates* "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in *Francis v. Franklin* was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the *Franklin* issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of *Francis v. Franklin*. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming *arguendo* that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under *Rose v. Clark*, then, in my opinion, we are still obliged to afford Mr. Yates a

new trial because the erroneous charge which created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Court has mandated.

FINNEY, A.J., concurs.

THE SUPREME COURT OF SOUTH CAROLINA

January 29, 1990

David I. Bruck, Esquire
1122 Lady Street, Suite 301
Columbia, SC 29201

Re: Yates v. Aiken

Dear Mr. Bruck:

The Court refused your Petition for Rehearing in the above case in the following order:

"Petition Denied. Page 4 Substituted.

/s/ George T. Gregory, Jr., C.J.

/s/ David W. Harwell, A.J.

/s/ A. Lee Chandler, A.J.

I would grant.

/s/ Jean H. Toal, A.J.

/s/ Ernest A. Finney, Jr., A.J.

January 29, 1990".

By copy of this letter all counsel are notified of the Court's action and are being forwarded a copy of the amended opinion.

Very truly yours,

/s/ [Illegible]
Clerk

CND,Jr./sag

Enclosure

cc: Stephen J. Henry, Esquire
Honorable Harold M. Coombs, Jr
John I. Mauldin, Esquire
Honorable Donald J. Zelenka

AMENDED OPINION

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL, SOUTH CAROLINA,
Respondents.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Opinion No. 22962

Submitted June 6 1988—Filed February 6, 1989

PETITION DENIED

GREGORY, C.J.: This case is before us on a petition for writ of habeas corpus. We deny the petition.

In 1981 petitioner was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. He was sentenced to death. The convictions and sentence were affirmed on appeal to this Court. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983).

Petitioner's subsequent application for post-conviction relief was denied by the circuit court in 1984. He then petitioned this Court for review of that denial by way

of writ of certiorari. He simultaneously petitioned for habeas corpus relief on the ground the trial judge's charge on implied malice was improper under state law [1] and under *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*. *Yates v. Aiken*, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

On remand this Court clarified the denial of the petition under state law.[2] *Yates v. Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986). Dissatisfied with this Court's disposition under *Francis v. Franklin*, however, the United States Supreme Court reversed the denial of the petition for habeas corpus. *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It held *Francis v. Franklin*, which condemns a mandatory presumption regarding proof of an element of the crime, applies retroactively to cases pending on collateral review because it merely reiterates the principles announced in the 1979 decision of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] This case was again remanded for further proceedings consistent with the Supreme Court's opinion. 98 L.Ed.2d at 554.

[1] Petitioner argued that under *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2] We held retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided and does not apply to collateral attacks. *See McClary v. State*, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3] We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under *Sandstrom* on direct appeal in state court. *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); *cf. Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980) (wherein petitioner in *Francis v. Franklin* raised mandatory presumption issue under *Sandstrom* in state court). Of course, we are constrained to accept the high court's mandate that *Francis v. Franklin* applies here.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

In *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court held jury instructions that violate *Francis v. Franklin* are subject to a harmless error analysis. The reviewing court must determine whether on the whole record the erroneous mandatory presumption is harmless beyond a reasonable doubt. 92 L.Ed.2d at 474. The pertinent inquiry is whether the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption. *Id.* Such an inquiry requires us to review the trial judge's charge and the facts of this case in the context of the malice element of the offenses charged.

We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused,

Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972); *State v. Gilbert*, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on the theory of accomplice liability. To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of

accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. *Rose v. Clark*, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon . . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (1985). On the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or implied. *State v. Hinson*, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury

would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

Pursuant to *Rose v. Clark* and based on our exhaustive review of the record, we hold any error under *Francis v. Franklin* is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder. The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary

defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In 1983, this court held that it was error for a trial judge to instruct a jury in a case that malice is mandatorily presumed from the use of a deadly weapon. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Prior to our decision, in *Elmore*, we had affirmed Yates' conviction on direct appeal [*State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982)] and summarily denied his petition for a writ of certiorari.

In 1985, the United States Supreme Court reversed a murder conviction and death penalty sentence in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), holding that where the accused's only defense is that he did not have the required intent to kill, an instruction that intent is presumed from the use of a deadly weapon is error and cannot be considered harmless.

Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in *Francis v. Franklin*. See *Yates v. Aiken*, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in *State v. Elmore, supra*, and *Francis v. Franklin*. We, however, declined to apply the *State v. Elmore* standard retroactively. *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). The retroactive application of *Francis v. Franklin* and the application of *Sandstrom v. Montana* was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in *Yates v. Aiken*, 484 U.S. ——, 108 S.Ct. 534, 98 L.E.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in *Francis*' was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of *Francis*, the Supreme Court analyzed the issue of the retroactivity of *Francis v. Franklin* to foreclose any further analysis by this court. The Court held that *Francis v. Franklin* was merely a reaffirmation of its holding in the 1979 *Sandstrom* opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a

new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under *Francis v. Franklin*. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of *Francis*, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding *Yates* "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in *Francis v. Franklin* was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the *Franklin* issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of *Francis v. Franklin*. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming *arguendo* that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under *Rose v. Clark*, then, in my opinion, we are still obliged to afford Mr. Yates a new trial because the erroneous charge which

created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the

State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Supreme Court has mandated.

FINNEY, A.J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 89-7691

DALE ROBERT YATES,
Petitioner

v.

PARKER EVATT, Commissioner, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 1, 1990

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7691 (5)

In The

Supreme Court of the United States

October Term, 1989

DALE ROBERT YATES,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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QUESTION PRESENTED

WHETHER THE BURDEN-SHIFTING JURY INSTRUCTIONS GIVEN AT PETITIONER'S TRIAL CONSTITUTED HARMLESS ERROR UNDER *ROSE v. CLARK*?

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CITATION TO OPINIONS BELOW

The revised majority opinion of the Supreme Court of South Carolina denying Dale Yates' petition for a writ of habeas corpus on the most recent remand from the United States Supreme Court is reported as *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530 (1989), and is reprinted at J.A. 147-152. The January 29, 1990 order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at J.A. 146. The original opinion of the South Carolina Supreme Court, later revised on denial of petition for rehearing, is unreported and is reprinted at J.A. 135-145. This Court's previous opinion reversing the judgment of the South Carolina Supreme Court is reported as *Yates v. Aiken*, 484 U.S. 211 (1988), and is reprinted at J.A. 128-134. The prior opinion of the South Carolina Supreme Court following summary reversal by this Court is reported as *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). J.A. 118-127. This Court's first decision granting the petition for writ of certiorari and remanding to the South Carolina Supreme Court is reported as *Yates v. Aiken*, 474 U.S. 896 (1985). J.A. 117. The initial *per curiam* order of the South Carolina Supreme Court dated May 23, 1985 denying Yates' petition for habeas corpus is unreported, and is reprinted at J.A. 116. The opinion of the South Carolina Supreme Court affirming Yates' convictions and death sentence on direct appeal is reported as *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1122 (1983). J.A. 99-115.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(A), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

The judgment of the South Carolina Supreme Court on remand from the United States Supreme Court was entered on February 6, 1989. A timely petition for rehearing was denied on January 29, 1990. On April 20, 1990, the Chief Justice of the United States, acting in his capacity as Circuit Justice for the Fourth Circuit, entered an order extending the time for filing the petition for writ of certiorari to and including May 29, 1990. The petition was filed on May 29, 1990, and was granted on October 1, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . . "

2. This case also involves S.C. Code §16-3-10 (1976), which provides:

> *"Murder"* is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

When this case was last here, the Court summarized the facts as follows:

> Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store a fight occurred in which the accomplice and the storekeeper's mother were both killed. . . .
>
> At his trial, petitioner testified that the decedent had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon". . . . [On collateral review] the state [supreme] court determined that the jury instruction at petitioner's trial "suffered from the same infirmities [. . .] addressed in *Francis v. Franklin*." [*Yates v. Aiken*,] 290 S.C. 231, 234, 349 S.E.2d 84, 85 (1986).

Yates v. Aiken, 484 U.S. 211, 212-213 (1988). On remand from this Court, however, the state court refused to grant relief, asserting that the constitutional defects in the jury instructions were not retroactively cognizable. *Yates v. Aiken*, 290 S.C. 231, 233-235, 349 S.E.2d 84, 85-86 (1986), J.A. 119-122. This Court again granted certiorari and unanimously reversed. *Yates v. Aiken*, 484 U.S. 211 (1988), J.A. 128-134. On this second remand, the state supreme court held that the unconstitutional jury instructions were harmless, and again denied relief, over the dissent of two of the court's five members. *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530 (1989), J.A. 147-158.

The harmless error inquiry before the Court demands a close review of the facts surrounding the armed robbery and homicide, for petitioner's conviction may be upheld

only if the evidence establishes, at a minimum, that the jurors would have found it unnecessary to rely on the unconstitutional presumptions in reaching their verdict. *Rose v. Clark*, 478 U.S. 570 (1986); *Francis v. Franklin*, 471 U.S. 307, 325-326 (1985). Petitioner and his accomplice, Henry Davis, entered the country store armed, respectively, with a pistol and a knife. Davis obtained a large quantity of cash from the storekeeper, Willie Wood, and handed it to petitioner. An altercation ensued during which petitioner fired two shots in Wood's direction. One of the bullets pierced Wood's outstretched hand and came to rest in his shirt pocket after superficially wounding him in the chest. Tr. 792-793; 952-953. Petitioner shouted, "Let's go!" to Davis, ran out of the store, and waited outside in Davis' car. At that moment Wood's mother, Helen Wood, entered the store from an adjoining office. A struggle followed involving Davis, Mrs. Wood and her son during which Mrs. Wood received a stab wound to the chest, and died almost immediately. Meanwhile Willie Wood had pulled out a loaded pistol from his belt and fired five bullets into Davis, killing him.

When Davis failed to emerge from the store after a few seconds, petitioner drove away. J.A. 58. He was arrested a short time later in some nearby woods after a hurried attempt to hide the pistol and money under some leaves. J.A. 82-83. He did not learn of Mrs. Wood's death until police informed him of it after his arrest. Tr. 1268-1270.

Petitioner was indicted for the murder of Helen Wood, as well as for conspiracy, armed robbery, and assault and battery with intent to kill for the shooting of Willie Wood. At trial, Willie Wood's description of the

crime made up the bulk of the state's case. J.A. 16-28. The state also presented the testimony of a third conspirator, David Loftis, who had participated in the initial planning for a robbery along with Davis and petitioner, but who did not accompany them to the Wood store. J.A. 6-16.[1] The state's primary contention in support of the murder charge was that Mrs. Wood's death was the probable result of the armed robbery of the store, and that petitioner's participation in this robbery rendered him vicariously liable for Davis' stabbing of Mrs. Wood under South Carolina state law principles of accomplice liability.

Petitioner testified in his own defense. On the witness stand he insisted that he had never intended Mrs. Wood's death and had not even been aware of her presence in the store. J.A. 42-43, 54, 61, 75, 77-78. Indeed, he and Davis had specifically planned not to harm anyone in the store under any circumstances. Rather, according to petitioner, they had agreed to use their weapons only to induce the storeowner to give them the cash from the till, and then flee the area immediately regardless of whether the storeowner complied. *Id*. As the South Carolina Supreme Court later noted, petitioner testified that "it was his intent all along to abandon the robbery without hurting anyone if the victims refused to cooperate." *State v. Yates*, 280 S.C. 29, 33, 310 S.E.2d 805, 808 (1982). Given this intent, petitioner's counsel argued to the jury, Mrs.

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[1] Loftis' testimony showed that Yates was originally assigned a relatively minor role in the planned armed robbery. According to the plan agreed upon earlier that day, Loftis was to enter the store with the gun, while Davis would drive his car as the getaway vehicle. Loftis testified that Yates' role was "to stay in the car and just watch, my backup or whatever." J.A. 10.

Wood's death was *not* the probable consequence of the planned robbery, and petitioner should not be held vicariously liable for it. J.A. 93.

In describing the events inside the Wood store, petitioner testified that he produced a gun and demanded money. J.A. 54. At the same time, Davis pulled out a knife. Until that moment, petitioner said, he had not been aware that Davis had taken the knife from the car into the store. J.A. 79. Wood placed a quantity of paper money on the counter. Davis picked up the money and handed it to petitioner, who then began backing toward the door. J.A. 55-56. Rather than following petitioner out, as he expected, Davis stayed at the counter and ordered Wood to lean over it. Petitioner assumed that Davis was trying to prevent Wood from reaching for a weapon, and continued to move toward the exit. J.A. 56-57. When petitioner was about two steps from the door, Davis suddenly yelled at him to shoot. Petitioner saw that Wood's hands were down, and thinking Wood was reaching for a gun, he fired two shots. At that moment petitioner heard a female voice calling, "What's going on out there?" Petitioner said, "Let's go!" to Davis, turned, and ran out the door. J.A. 57. Reaching Davis' car, he waited for Davis briefly, and then moved under the wheel and drove off. J.A. 57-58. Petitioner insisted that he never saw Mrs. Wood at any time before, during or after the robbery. J.A. 54, 61.

Willie Wood was the only surviving witness to the events in the store after petitioner fled. According to Wood, Davis moved down the counter, and the two men met at the end of the counter and began struggling. J.A. 18-19. By then Helen Wood had entered the store. She

grabbed Davis, apparently from behind or from the side, and "all three of [them] stumbled around the corner, out in the aisle." J.A. 19. By this time Wood had pulled his pistol from his clothing. As Davis retreated into a row of shoe boxes, still holding his knife but apparently trapped along a wall of the store, Wood emptied his fully-loaded .38 caliber revolver into Davis' body, killing him. J.A. 19-22, 26. Wood then noticed his mother on her hands and knees, bleeding profusely. J.A. 27.

An autopsy revealed that Mrs. Wood had suffered a single stab wound to the heart. J.A. 31-32. The testimony does not disclose the depth of this wound nor any estimate of the force which would likely have been required to inflict it. *Id.* Although the South Carolina Supreme Court would later characterize the homicide as a "multiple stabbing," *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530, 532 (1989), J.A. 151, the autopsy revealed no additional injuries to Mrs. Wood other than the one stab wound. Significantly, there were no defensive wounds on her hands, nor other evidence of a struggle with her assailant. J.A. 32.[2]

In his closing argument, the prosecutor targeted petitioner's claim that he had not planned to injure anyone during the robbery, and that he had tried to return to this

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[2] Equally unsupported by the record is the state court's repeated assertion that "Davis lunged at Mrs. Wood with his knife." *Yates v. Aiken*, 290 S.C. 231, 236, 349 S.E.2d 84, 87 (1986); *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530, 531 (1989). Willie Wood's uncontroverted testimony indicated that Mrs. Wood grabbed Davis while he and Mr. Wood were struggling. J.A. 19-20.

plan, despite having shot at Willie Wood, by fleeing the store before Mrs. Wood's arrival. First, the prosecutor stressed that Helen Wood's death was the probable consequence of the common design to commit armed robbery, thus justifying a guilty verdict under accomplice liability principles. In so doing, the prosecutor urged the jury to convict petitioner of murder because "[t]he malice required was in his heart," noting that "[h]e pointed a pistol and pulled the trigger." J.A. 83. In addition, the prosecutor asserted on the basis of circumstantial evidence[3] that petitioner and Davis had actually intended from the outset to kill *any* witnesses to the robbery, including Mrs. Wood. J.A. 85-86.

The trial judge began his charge to the jury with general instructions concerning the function of the jury and the state's burden of proving guilt beyond a reasonable doubt.[4] He then defined the offenses of conspiracy to

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[3] The prosecutor stressed that the robbers did not conceal their identity, and asserted that Davis' use of a knife in the robbery, and his order to Willie Wood to bend over the counter, showed both robbers' pre-existing plan to commit murder without creating any noise or attracting attention. The prosecutor also argued that petitioner and Davis probably saw Mrs. Wood outside the store just before the robbery. J.A. 85-88.

[4] These instructions included the statement that "reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason." J.A. 95. *See Cage v. Louisiana*, No. 89-7302 (U.S., Nov. 13, 1990) (due process violated by misdefinitions of reasonable doubt as "such a doubt as would give rise to a grave uncertainty," and "actual substantial doubt," together with reference to "moral certainty"), *cf. Taylor v. Kentucky*, 436 U.S. 478, 488 (1978). The

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commit armed robbery and armed robbery, stating that "a deadly weapon . . . is any object which can be readily . . . put to use in inflicting personal injury on another person." J.A. 95.

Next, the trial judge defined murder and its constituent element of malice. S.C. Code §16-3-10 (1976). The instruction began with an explanation of the concepts of express and implied malice. J.A. 96. The judge continued, "Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." J.A. 96. After advising the jury that this presumption of malice was not conclusive but could be rebutted, the trial judge announced a second mandatory rebuttable presumption: "Malice is implied or presumed from the use of a deadly weapon." *Id.* The South Carolina Supreme Court later held both of these instructions unconstitutional under *Francis v. Franklin*, 471 U.S. 307 (1985). J.A. 119, 148-149 n. 3, 151.

Immediately following the malice charges, the trial judge went on to explain South Carolina's law of accomplice liability. These instructions began with the admonition to the jury that the law of accomplice liability was applicable "depending on your view of the facts . . . and the question is whether this law would apply to the facts

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prosecutor's opening statement at the beginning of petitioner's trial anticipated and emphasized the judge's equation of "reasonable doubt" with "substantial doubt." J.A. 4-5.

as you find them to be." J.A. 97. The instructions continued:

> If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties *and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act*, all present, participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

J.A. 97 (emphasis added). The judge stated that an actual agreement to kill was not required to render an accomplice vicariously liable, but, he repeated, such liability did depend on whether "the unlawful common purpose involves the probable contingency of taking a human life. . . . " *Id.* He also instructed the jury that:

> [a] defendant is not responsible for a homicide committed by his co-defendant as an independent act *growing out of some private malice or ill-will* which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

J.A. 98 (emphasis added).

The judge next explained the law of withdrawal, informing the jury that even where homicide is the natural and probable consequence of a crime, a party to that crime "may escape liability for such homicide if he completely withdraws from the original criminal undertaking, and communicates that withdrawal to his accomplice in sufficient time for the accomplice to have withdrawn

as well." The party's withdrawal from the scene of the crime, while not necessarily sufficient to establish withdrawal, was a circumstance which the jury was entitled to consider in determining whether the defendant had in fact withdrawn from the criminal enterprise. J.A. 98. Finally, the judge defined the offense of assault and battery with intent to kill, explaining that this offense, like murder, required proof of malice. Tr. 1211-1212.[5]

The jury deliberated for 45 minutes before convicting petitioner on all charges, including the murder of Helen Wood. The following day, the trial jury sentenced petitioner to death for Mrs. Wood's murder.[6]

The South Carolina Supreme Court upheld petitioner's convictions and death sentence on direct appeal. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert.*

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[5] The present habeas corpus petition does not challenge petitioner's conviction for assault and battery upon Willie Wood, nor those for armed robbery and conspiracy. Accordingly, the validity of those convictions is not before the Court.

[6] The jury's sentencing decision was apparently not an easy one. After an hour and 19 minutes of deliberation, the jury returned to the courtroom to inform the trial judge that it was deadlocked on the issue of sentence, and that "the feeling is that neither side was going to change its vote." Tr. 1371-1372. The trial judge refused to accept this declaration of a deadlock and instructed the jury to continue its deliberations. At the same time, he also refused petitioner's request that the jury be informed that its inability to agree on a sentence after reasonable deliberations would result in imposition of a life sentence, S.C. Code §16-3-20(C) (1981 Cum. Supp.), and that a new trial would not be required. Two-and-a-half hours later, the jury returned with a binding recommendation that petitioner be sentenced to death. Tr. 1372-1377.

denied, 462 U.S. 1124 (1983). Shortly after his convictions became final, the state supreme court acknowledged the unconstitutionality of implied malice instructions like those given at petitioner's trial. *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983); *State v. Woods*, 282 S.C. 18, 19-20, 316 S.E.2d 673 (1984). Subsequently, petitioner's case followed a winding procedural path. As this Court recalled in its prior opinion in this case:

> [P]etitioner sought a writ of habeas corpus from the South Carolina Supreme Court, arguing that the burdenshifting instruction given at his trial was unconstitutional under the state court's reasoning in *Elmore* and under our decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). While the application for habeas corpus was pending, we decided another case involving a burdenshifting instruction, *Francis v. Franklin*, 471 U.S. 307 (1985), and petitioner promptly called that decision to the attention of the state supreme court. The court denied the writ without opinion.
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> Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of *Francis v. Franklin*." *Yates v. Aiken*, 474 U.S. 896 (1985). On remand the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in *Elmore* and addressed in *Francis v. Franklin*." 290 S.C. 231, 233, 349 S.E.2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in *Elmore* should not be applied retroactively to invalidate a conviction that was final when *Elmore* was decided.

Yates v. Aiken, 484 U.S. 211, 212-213 (1988).

This Court again granted certiorari and unanimously reversed, holding that the state court had erred in denying full retroactive effect to *Francis v. Franklin*. In doing so, the Court stated that when it previously granted certiorari and remanded petitioner's case for reconsideration, *Yates v. Aiken*, 474 U.S. 896 (1985),

> [o]ur mandate contemplated that the [South Carolina Supreme Court] would consider whether, as a matter of constitutional law, petitioner's conviction could stand in the light of *Francis*. Since the state court did not decide that question, we shall do so.

484 U.S. at 215. The Court then proceeded to reverse the South Carolina Supreme Court's judgment denying habeas relief, and ordered the state supreme court "to grant the relief that federal law requires." *Id.*, at 218.

On remand, a three-to-two majority of the South Carolina Supreme Court once again denied relief. First, the state court majority asserted that while it was "constrained to accept the high court's mandate that *Francis v. Franklin* applies here," the state court interpreted this Court's opinion as meaning that "petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under *Sandstrom* on direct appeal in state court." *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530, 531 n. 3 (1989), J.A. 148 n. 3. Having thus decreed (despite having itself twice decided the merits of petitioner's claim) that petitioner was foreclosed from further review as of right in the federal courts, the state court again denied relief,

this time on the ground that the *Sandstrom* error was harmless. *Id.*, J.A. 149-152.[7]

The state court reiterated that the trial judge's charge included two separate erroneous presumptions of malice. 391 S.E.2d at 532; J.A. 151; *see Yates v. Aiken*, 290 S.C. 231, 233, 349 S.E.2d 84, 85, J.A. 119. However, the court asserted that because the state prosecuted petitioner on a theory of accomplice liability, his own mental state was irrelevant, and the jury was required only to determine whether petitioner's accomplice, Davis, had acted with malice when he fatally stabbed the victim. Concluding that the jury "would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice," 391 S.E.2d at 532, J.A. 151-152, the court held the unconstitutional instructions to be harmless.

Justice Toal dissented in an opinion joined by Justice Finney. The dissent expressed doubt that this Court's prior decision authorized the state court to engage in harmless error analysis on remand, and concluded, in any

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[7] The state had previously pressed a harmless-error claim before the South Carolina Supreme Court both when the petition was first presented to that court in early 1985, and again at greater length when this Court first remanded the case for reconsideration in light of *Francis v. Franklin*. Brief of Respondents at 19-21, *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). On the latter occasion, the state court cited *Rose v. Clark*, 478 U.S. 570 (1986) for the proposition that *Francis* errors could be harmless under some circumstances, *Yates v. Aiken, supra*, 290 S.C. at 234 n. 1, 349 S.E.2d at 86 n. 1, J.A. 121 n. 1, but implicitly declined the state's invitation to decide the question of harmless error.

event, that the errors were not harmless. Justice Toal pointed out that the application of South Carolina's law of accomplice liability to this case was complicated by the fact that petitioner had contended that he had withdrawn, and thereby created a substantial factual question as to whether he could be held accountable for Davis' homicidal act under that theory. The dissent continued:

> Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the trial judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial.

Yates v. Aiken, supra, 391 S.E.2d at 535 (Toal, J., dissenting), J.A. 156.

Petitioner moved for rehearing. After nearly a year, a divided state court denied the motion. J.A. 146. Nevertheless, the majority made one substantive change in its opinion. Where the original opinion had stated that "[i]n the context of accomplice liability for murder, the element of malice which must be proved is that of the *killer*," J.A. 139 (emphasis in original), the amended opinion substituted, "On the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis." *Yates v. Aiken, supra*, 391 S.E.2d at 532, J.A. at 151. The majority opinion did not quote or cite any portion of the trial judge's charge, or

any other portion of the record, in support of this assertion.

SUMMARY OF ARGUMENT

The state supreme court's most recent denial of relief is based on a series of erroneous assumptions about the evidence, the instructions and the applicable law, and bears little resemblance to the harmless error analysis approved by this Court's decisions. The basis of the state court's harmless error holding was that the malice of the actual killer, Davis, was proven by overwhelming evidence, and that under state law principles of accomplice liability, the jury's finding of Davis' malice sufficed to support Yates' conviction. As an initial matter, assuming that due process permits an assessment of the entire record rather than simply of the strength of the predicate facts in determining the harmlessness of an unconstitutional presumption, *infra* at 18-19, 35-36, the state court erred in its estimation of the strength of the record evidence of Davis' malice. Shorn of the state supreme court's exaggerations, the evidence on this point did not exclude the reasonable possibility that Davis accidently stabbed the victim during his desperate and unsuccessful effort to avoid being shot and killed by her son. Because the evidence of Davis' malice in the killing of Mrs. Wood was circumstantial and by no means conclusive, the jury's verdict might reasonably have been affected by instructions which created mandatory presumptions of malice on the basis of no more than participation in an armed robbery and the use of a deadly weapon. *Infra* at 20-22.

Moreover, even had Davis' malice been proven by overwhelming evidence, the state court erred in its apparent assumption that the jury would have interpreted its instructions as requiring any determination of Davis' mental state. Rather, as noted by the dissenting opinion below, it is much more likely that the jury understood its task to be to determine whether *Yates* acted with malice in connection with the victim's death. *Infra* at 24-26.

This has both legal and factual significance. As a matter of constitutional due process, the strength of the evidence of *Davis'* malice cannot save petitioner's conviction because the jury was never clearly instructed to consider that issue at all. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *cf. Pope v. Illinois*, 481 U.S. 497, 502-503 (1987). *Infra* at 32-34. Moreover, once the jury focused on the issue of *Yates'* malice, it would naturally have understood that issue (informed by the unconstitutional instructions) to be intertwined with two closely-related factual determinations concerning Yates' mental state. These are

> (1) whether Yates' intent in agreeing to help rob the Wood store encompassed a probable homicide (an element of accomplice liability under state law), *infra* at 23-29, and
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> (2) whether Yates had sufficiently withdrawn from the criminal enterprise prior to the killing to free him from liability as an accomplice. *Infra* at 29-30.

Because each of these issues required jury assessments of Yates' intent, and because the most reasonable interpretation of the judge's instructions was to require the jury to

determine whether Yates acted with malice in connection with Mrs. Wood's death, the unconstitutional presumptions of malice likely affected the jury's resolution of both of the factual issues on which Yates' liability as an accomplice depended. Given that the evidence was in conflict on these issues, and that a properly-instructed jury could reasonably have resolved either or both of them in petitioner's favor, the constitutional errors cannot be disregarded as harmless. *Rose v. Clark*, 478 U.S. 570 (1986).

ARGUMENT

The proper standard for evaluating whether a jury charge containing an unconstitutional presumption is harmless is the subject of some debate. See *Carella v. California*, ___U.S.___, 109 S.Ct. 2419, 2421-24 (1989) (Scalia, J. concurring). In *Carella*, four members of the Court noted that *Rose v. Clark*, 478 U.S. 570 (1986), had suggested two different approaches to harmless error analysis in this context. Under one, the inquiry turns on whether the predicate fact was so indicative of the presumed fact that an appellate court could be confident that a jury that had found the former could not help but to have found the latter.[8] Under the second, the inquiry is

[8] This approach would also treat unconstitutional presumptions as harmless where the defendant admits the element's existence at trial, or where the jury acquits the defendant of the charge containing the presumed element. *Carella v. California, supra*, 109 S.Ct. at 2423 (1989); *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion).

somewhat broader, asking "whether the evidence was so dispositive of [the element] that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Id.*, 109 S.Ct. at 2424; *see also, Pope v. Illinois*, 481 U.S. 497, 503 & n.6 (1987) (question is whether it is "clear that if the jury had never heard the impermissible instruction its verdict would be the same"). Even under this second approach, which allows a reviewing court greater license to reevaluate the entire factual record, respondent cannot possibly carry its burden of demonstrating that the constitutional error in this case was harmless. *Chapman v. California*, 386 U.S. 18 (1967).

In concluding that the illegal instruction was harmless, the South Carolina Supreme Court reasoned that under the state law of accomplice liability, the only "malice" that the jury was required to find was that of the actual killer, Davis. Apparently believing that the evidence of his malice was overwhelming, the court concluded that the jury would have "found it unnecessary to rely on the erroneous presumption" to convict petitioner of murder. J.A. 151.

That conclusion was erroneous for several reasons. To begin with, even under the legal framework posited by the court below, the evidence of Davis' malice was hardly so clear as to permit a reviewing court to find *beyond a reasonable doubt* that the jury "would have found it unnecessary to rely on the presumption." *Rose v. Clark, supra*, 478 U.S. at 583. Moreover, a reasonable juror would have interpreted the instructions as requiring an assessment of Yates' "malice." *See Sandstrom v. Montana*, 442 U.S. 510, 515-517 (1979). Because Yates' state of mind was

an essential element required for conviction under a theory of accomplice liability, and because the evidence of his malice was highly equivocal, the error was not harmless regardless of the strength of the evidence pertaining to Davis. Finally, because there is no way of knowing whether the jury convicted Yates on the basis of an assessment of his malice as opposed to that of Davis, the error is prejudicial as a matter of law. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

A. The Evidence of Davis' Malice Was Not So Overwhelming as to Remove the Effect of the Burden-shifting Presumptions

Even if the only issue in this case were whether the evidence establishes Davis' malice beyond a reasonable doubt, the judgment below would have to be reversed. Independent of the presumption, the evidence pertaining to Davis' state of mind was as follows: Willie Wood, the only surviving witness to his mother's death, testified that she entered the store from an adjoining office just as Davis and Mr. Wood began to scuffle. J.A. 17, 19, 25-26. Mr. Wood testified that his mother grabbed Davis, possibly from behind, and was fatally stabbed in the ensuing three-way struggle. *Id.* The autopsy revealed that Mrs. Wood had been stabbed only once. J.A. 31-32.[9] On the

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[9] This actual scarcity of evidence may explain the state court's tendency to exaggerate and misrepresent the record. While the prosecution's uncontroverted eyewitness and autopsy evidence established that Mrs. Wood was stabbed only

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basis of these facts, the jury could well have concluded that Davis had not intended to kill Mrs. Wood, but had done so inadvertently in the course of the struggle.[10] In this connection, the evidence strongly suggested that Davis already knew that Mr. Wood had a gun, thus providing the jury with an additional reason to doubt that Davis had acted out of malice, but to suspect instead that he might have inadvertently stabbed Mrs. Wood while flailing about in a panicky (and unsuccessful) effort to avoid being shot and killed by her son.

To be sure, on this record, the jury *could have* found the evidence that Davis acted with malice to be sufficient. *Cf. Jackson v. Virginia*, 443 U.S. 307 (1979). That, however, is not the relevant inquiry. At the very least, the evidence of Davis' malice is sufficiently ambiguous to prevent a

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once in the course of the struggle that she deliberately joined, the court asserted that she suffered a "multiple stabbing" when "Davis lunged at [her] with his knife." *Compare* J.A. 19, 25-26, 31-32, *with* 123, 150-151. The state court's embroidery may have bolstered its own conclusion that Davis acted in malice, but it cannot cure the record's real deficiencies on this element.

[10] The presence or absence of malice distinguishes murder and manslaughter under South Carolina law. S.C. Code §§16-3-10, -50 (1985). Involuntary manslaughter requires criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code §16-3-60 (1985). A killing can constitute involuntary manslaughter rather than murder even if it is committed with a deadly weapon during a robbery, so long as it is unintentional. *See State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585, *cert. denied*, 456 U.S. 938 (1982). Nor does the fact that a homicide was committed with a knife exclude the possibility that the slayer did not intend to kill. *State v. Gorey*, 235 S.C. 301, 111 S.E.2d 560 (1959).

reviewing court from concluding beyond a reasonable doubt that "if the jury had never heard the impermissible instruction its verdict would have been the same." *Pope v. Illinois, supra,* 481 U.S. at 503 n. 6.

B. Regardless of the Strength of the Evidence Pertaining to Davis' Malice, the Presumptions, in the Context of Instructions Which Directed the Jury to Focus on Yates' State of Mind, Were Highly Prejudicial.

In any event, even were the Court to conclude that the evidence demonstrates beyond a reasonable doubt that Davis had the requisite malice, the erroneous instructions would still have been highly prejudicial. To say the least, as pointed out by the dissenting justices below, the jury charge was "confusing." J.A. 156. In fact, it is far from clear that the jury would have understood the charge to have required an assessment of Davis' malice at all. *See infra* at 24-27. But even if that were a possible interpretation of the instructions, it is equally if not more likely that a reasonable juror would have interpreted the charge as requiring an assessment of Yates' state of mind – i.e., whether he independently had the requisite malice. *Id.*

By directing the jury to focus on Yates' malice, the charge could have made, and probably did make, a difference in the outcome of the case in one of several ways. Because Yates was indisputably not the actual killer, a murder conviction could only be premised on a theory of accomplice liability. In order to be convicted on that theory, however, the jury would have to conclude: (1) that the homicide was either an actual part of the robbery

scheme or its natural and probable consequence, *and* (2) that Yates had not withdrawn from the scheme by the time that Davis actually stabbed Mrs. Wood. In both respects, as is explained in the sections below, the trial judge's direction to focus on Yates' malice was crucial to the jury's deliberations. Moreover, because the State's evidence was equivocal on both points, it is impossible to conclude "beyond a reasonable doubt" that the outcome was not affected by the impermissible presumptions.

1. By Directing the Jury to Presume Yates' Malice, the Instructions Prejudiced Petitioner by Relieving the Prosecution of its Burden to Prove the Threshold Element of the Offense – that Homicide Was An Intended or Probable Consequence of the Plan to Rob the Store.

Yates' principal contention at trial was that, although he and Davis had planned to rob the Woods' store, Mrs. Wood's murder was neither within the express terms of the plan nor a natural and probable consequence of it – the threshold element of the offense of murder on a theory of accomplice liability.[11] By directing the jury to presume Yates' malice from proof of certain predicate facts – i.e., that he possessed a gun, and that he had engaged in a robbery – the charge could reasonably have been understood to have shifted the burden of proof on

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[11] Under South Carolina law, when the state seeks a murder conviction on a theory of accomplice liability, proof that the murder was an intentional or probable consequence of the underlying criminal scheme is an element of the offense. *State v. Peterson,* 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985).

the element of the offense that was most seriously contested at trial. Because, apart from the presumption, proof of that element was far from overwhelming, the State cannot carry its burden of demonstrating that the error was harmless beyond a reasonable doubt.

Contrary to the apparent view of the court below, the record leaves little doubt that the jury would have interpreted the instructions as requiring an assessment of Yates' state of mind, as opposed to that of Davis.[12] The judge began by reminding the jury that the State had charged *Yates* with having "committed the crime of murder." J.A. 95. The instruction immediately added that the State must "prove the killing of the deceased *by the Defendant*" with "malice aforethought." J.A. 96 (emphasis supplied). The charge's long definition of malice, which followed shortly thereafter, could easily have led a reasonable juror to believe that assessing the "Defendant['s] . . . malice aforethought" was central to the jury's decision in the case. Only once, at the very end of the malice instructions, did the judge even suggest that anyone else's state of mind could be at issue: he urged the

[12] It is not clear whether the South Carolina Supreme Court believed the jury to have been instructed to determine whether Davis acted with malice, or whether it simply considered the evidence that he did to be so convincing that such a jury determination was unnecessary. As will be seen momentarily, the first of these explanations for the state court's analysis is unsupported by the record. The second is impermissible as a matter of constitutional law. *Infra* at 32-34.

jury "to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." J.A. 96-97. This reference to an unidentified "killer" was at best oblique, however, since it followed the judge's instruction that the jurors were to decide whether the state had proved "the killing of the deceased by the Defendant . . . with malice aforethought," and his reminder that Yates was charged with "the unlawful killing of [a] human being." J.A. 95-96.[13]

Moreover, beyond this general direction to focus on Yates' state of mind, the charge strongly suggested that the question of whether Yates personally acted with "malice" was inextricably bound up with the central issue of the intended scope, or likely consequences, of the robbery – the threshold element for conviction as an accomplice. Thus, the court explained that under the law of accomplice liability, one "is not responsible for a homicide committed . . . as an independent act growing out of some *private malice* or ill will which the slayer had toward the deceased and which is not in furtherance of or connected with the original unlawful purpose" of the joint plan. J.A. 98 (emphasis added). A reasonable juror following this charge would have considered whether Yates so lacked

[13] No other portion of the court's instructions, moreover, even remotely suggested that the jury was concerned with the intent of anyone other than the defendant on trial. On the contrary, every other part of the charge, including the references to a deadly weapon in the armed robbery instructions, J.A. 95, and the discussion of malice in the charge on assault and battery with intent to kill, Tr. 1211-1212, focused the jury's attention on petitioner alone.

malicious intent that Davis' killing of Mrs. Wood reflected some "private" malice that he alone harbored. Conversely, given the general directions to focus on Yates' "malice," a reasonable juror could have concluded that a finding that Yates acted with malice was inconsistent with his claim that the murder was beyond the intended scope of the robbery. The likelihood that the jury understood the charge in that way was heightened by the prosecution's contention that Yates and Davis had intended from the outset to kill any witnesses to the robbery, J.A. 85-87, and by the prosecutor's argument that Yates' use of a pistol to shoot Willie Wood established his guilt of Mrs. Wood's murder because it showed that "[t]he malice required was in his heart." J.A. 83.[14] At the

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[14] While this statement by the prosecutor may not in itself prove that the jury also considered the "malice required" for murder to be petitioner's rather than Davis', it undeniably contradicts the state supreme court's assertion that "the element of malice relied on by the State is that of the killer, Henry Davis." J.A. 151. Whatever the merits of that assertion as an abstract proposition of South Carolina law, the jury's interpretation of its instructions is more likely to have been influenced by the statements of the prosecutor at trial than by the contrary assertions of the state supreme court more then eight years later. *Sandstrom v. Montana*, 442 U.S. 510, 516-517 (1979) (state supreme court is the final authority on state law basis of jury instruction, but not on jurors' likely interpretation of the instruction). *See also, California v. Brown*, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring) (prosecutor's argument relevant to assessment of how jury might have interpreted instructions); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (prosecutor's argument relevant in assessing harmless-error claim).

very least, considering the malice instructions in the context of the charge as a whole and of the prosecutor's argument, a reasonable juror would have realized that Yates' state of mind before and during the robbery was relevant to whether homicide was a "probable and natural result" of the joint plan. J.A. 98.

Once it is understood that the jury's estimation of Yates' malice was crucial to the outcome of the case, the only remaining question is whether the evidence suggestive of such malice was so conclusive that the Court can find beyond a reasonable doubt that the jury would "have found it unnecessary to rely on the presumptions." *Pope v. Illinois*, 481 U.S. 497, 503, n. 6 (1987). On this record, the State cannot begin to make such a showing.

The evidence supporting the state's contention that Yates' original plan encompassed an intent to commit homicide was weak at best. In support of this contention, the prosecutor placed principal reliance on the fact that Yates had shot at Willie Wood before fleeing, and that both participants in the crime had carried weapons. J.A. 83-84. In addition, he contended that Yates' and Davis' failure to conceal their identities, and Davis' attempt to make Willie Wood lean over the counter, proved circumstantially that both men had planned from the start not to risk leaving any witnesses alive. J.A. 86-87. In response, Yates not only explicitly denied that he and Davis had planned to kill any witnesses, but also pointed to substantial circumstantial evidence to support that claim. In particular, it is undisputed that (1) Yates had fled the store, with three unspent rounds still in his pistol, Tr. 985, believing Mr. Wood to be still alive, J.A. 58, 82, and (2) that Yates withdrew after he heard a woman shout from

an adjoining office. Tr. 57, 61. A reasonable jury could have concluded that Yates' failure to carry out the alleged plan to kill all witnesses suggested that no such plan ever existed.

For similar reasons, the evidence on the closely related question of whether the homicide was a "natural and probable" consequence of the scheme was also far from overwhelming. To support its position, the state again relied on the fact that both participants had carried deadly weapons. But that, alone, is hardly conclusive – especially in light of the other circumstantial and direct evidence supporting the contention that Yates had never intended to kill the proprietors.[15] Moreover, because the jury was specifically directed to presume Yates' "malice" from proof that he possessed a gun, the prosecutor's reliance on the use of a gun served only to enhance the likelihood that the jury resorted to the impermissible presumptions in resolving this issue. *See* J.A. 156, *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530, 534-35 (1989) (Toal, J., dissenting) ("Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the

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[15] As the Court noted in *Enmund v. Florida*, 458 U.S. 782, 799-800 (1982), "only about one-half of one percent of robberies resulted in homicide" in the United States in a series of studies conducted throughout this century, and FBI crime statistics for 1980, the year before petitioner's offense, showed the homicide rate in robberies to be just 0.43 percent. *Id.* The jury's refusal to treat the plan to rob the Wood store as involving a "probable" homicide would thus have been quite consistent with society's actual experience with such crimes.

requisite intent to murder."). Under these circumstances, a reviewing court simply cannot find beyond a reasonable doubt that the jury would have found it unnecessary to rely on the improper instructions.

2. The Impermissible Instruction Also Undermined Yates' Contention that He Had Withdrawn from the Scheme by the Time of the Murder.

The burden-shifting instructions were prejudicial in a second respect as well. Under South Carolina law, even if a criminal scheme does include a plan to kill, a co-conspirator who withdraws from that scheme before a killing occurs may not be convicted of homicide as an accomplice. J.A. 24-25. A reasonable juror could well have interpreted the instructions on malice and withdrawal to require a determination of whether Yates still had the requisite "malice . . . in his heart" when he shouted, "Let's go!" and fled the store. Because such an interpretation would have been entirely reasonable in the context of the charge as a whole, the only remaining question is whether the unconstitutional instruction to presume Yates' malice was nonetheless legally superfluous – i.e., whether the other evidence at trial demonstrates beyond a reasonable doubt that Yates had not withdrawn from the scheme.

Here too, the evidence belies the contention that the error was harmless. Not only did the State fail to controvert Yates' evidence that he removed himself from the scene well before Mrs. Wood was stabbed, but nothing contradicts Yates' assertion that he fled before she even entered the room and *because* she had made known her

presence in the adjoining office. J.A. 57, 61. Further, Yates unequivocally communicated his withdrawal to Davis by shouting "Let's go!" *Id*. Nothing in the record suggests that Davis could not have fled along with Yates at that point. The fact that Davis chose not to leave with Yates might well have led a reasonable juror to conclude that Davis was, at least from that point forward, acting out of his own "private malice or ill will," J.A. 98, and not out of any shared intent to kill Wood or his mother. At the very least, the evidence of Yates' state of mind when he fled the store is sufficiently ambiguous that no reviewing court could conclude beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumptions in resolving the question of withdrawal. *Yates v. Aiken, supra*, 391 S.E.2d at 534-535 (Toal, J., dissenting); J.A. 156.

C. Under Either Interpretation of the Jury Verdict, The Improper Presumptions Cannot be Disregarded as Harmless Beyond A Reasonable Doubt

Recognizing that the impermissible presumptions might have affected the verdict in either or both of these ways – by undermining petitioner's contention that the murder was beyond the scope of the criminal plan and by eclipsing the claim of withdrawal – is crucial to the proper disposition of this case. The apparent view of the court below was that, even if the jury focused on Yates' malice and even if independent evidence of that malice was equivocal, the verdict should stand because: (1) the evidence of *Davis'* malice was overwhelming; (2) under South Carolina law, that malice should have been imputed to Yates; and that (3) Yates is therefore guilty of

murder beyond a reasonable doubt even if the presumptions did affect the jury's consideration of Yates' own state of mind.

For the reasons set forth above, any such assertion is patently without merit. Because of Yates' twin contentions that murder was outside the scope of the original scheme and that he had withdrawn – and the jury's possible confusion about the role of Yates' own malice in determining the merit of each of those claims – it is simply not possible to separate completely a conviction on the basis of accomplice liability from one in which Yates' state of mind (as informed by the presumptions) played a significant role. In other words, even if Davis' malice was proven overwhelmingly independent of the presumptions, the Court still cannot conclude beyond a reasonable doubt that conviction on an accomplice liability theory was unaffected by the illegal presumptions.

Moreover, the legal predicate of the lower court's reasoning is simply incorrect. In essence, its position was that the conviction should be affirmed on a theory of accomplice liability (which it assumed to be untainted by the presumptions) even though the jury might in fact have premised a verdict on the theory that Yates personally had the requisite malice to support the conviction (a theory that was undeniably tainted by the unconstitutional charge). Even if these two theories could be so neatly divided – which they simply cannot – that kind of post-hoc reconstruction of the evidence is constitutionally inappropriate on the facts presented here.

First, as a general proposition, a jury verdict that could be based on more than one ground must be set

aside if one of those grounds was prejudicially unconstitutional and the reviewing court cannot ascertain whether the jury relied on that ground. *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). In other words, when a jury is presented with two alternative theories, one of which was infused with prejudicial error, the Court cannot find beyond a reasonable doubt that the error was not prejudicial.

Moreover, quite apart from the two defects in such a claim already discussed – the fact that Davis' malice was *not* overwhelmingly established, and that the unconstitutional instructions might well have relieved the state of its burden of proving Yates' mental state as an accomplice – this harmless-error argument contains an even more fundamental defect. This is that the essential element on which the argument rests – Davis' malice – was probably never found by the trial jury at all.

For the reasons set forth above, *supra* at 24-27, the most likely interpretation of the trial judge's instructions was that the jury had to determine whether "the Defendant," Yates, possessed the element of malice. While it is perhaps conceivable that the jury ignored both the thrust of the instructions and the prosecutor's argument to arrive at a unanimous determination of Davis' mental state at the time of the murder, the record provides little reason to accept such a supposition. Accordingly, the basis of the state's harmless-error analysis cannot be that the jury actually did find Davis to have acted with malice beyond a reasonable doubt. Rather, it is that the jury *would have* made such a finding, had it been clearly instructed to consider the issue.

Such an argument bears no resemblance to the type of harmless-error analysis which this Court's precedents authorize. The basis of this Court's decisions admitting of the possibility of harmless *Sandstrom* error is that even where the prosecution's burden of proof has been unconstitutionally lightened by an improper presumption, the jury has nevertheless performed its constitutionally-assigned function of finding each element of the offense charged. *Rose v. Clark*, 478 U.S. 570, 580-581 (1986). But where the jury's instructions did not plainly require it to make any finding at all concerning an essential element of the offense charged under state law, the fact that such a finding would have been supported by overwhelming evidence cannot save the conviction. This is so because, as is true of a directed verdict in favor of the prosecution, "the error in such a case is that the wrong entity judged the defendant guilty." *Id.*, 478 U.S. at 578.

The application of these principles here is a straightforward matter. As we have seen, the jury probably convicted Yates by concluding (with assistance from the unconstitutional presumptions) that *he* acted with malice. The state supreme court has now found him guilty on the basis of its conclusion that *Davis* acted with malice. That both findings involve "malice" cannot change the fact that they involve different people, and are thus quite different findings. A comparison to *Pope v. Illinois*, 481 U.S. 497 (1987) is instructive in this regard. Although Pope's jury was given a constitutionally invalid definition of an element of obscenity, the Court found that the instruction was susceptible of harmless error analysis. The basis of this holding was that the trial jurors in *Pope* "were informed that to convict *they must find* . . . that the

magazines petitioners sold were utterly without redeeming social value." 481 U.S. at 503 (emphasis supplied). The Court therefore concluded that the jury had fulfilled its constitutionally-assigned role of finding each element of the offense charged beyond a reasonable doubt. *Id.* But had the instructions in *Pope* authorized the jury to convict by considering the wrong magazines, no amount of evidence concerning the magazines which the jury should have considered could have rendered the error harmless. For in such a situation, it could not be said "that *the jury* has found . . . 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Rose v. Clark, supra,* 478 U.S. at 581 (emphasis supplied) (quoting *In re Winship,* 397 U.S. 358, 364 (1970)).

In relying on the resolution of a factual issue – Davis' mental state – which the jury was never required to make, the South Carolina Supreme Court overlooked a fundamental principle of appellate review affirmed many times in this Court's decisions: "the question is not whether guilt may be spelt out of a record, but whether guilt has been found *by a jury* according to the procedures and standards appropriate for criminal trials." *Bollenbach v. United States,* 326 U.S. 607, 614 (1946) (emphasis supplied); *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572-573 (1977); *Carpenters v. United States,* 330 U.S. 395, 408-409 (1947). For this additional reason, the state court's denial of habeas corpus relief violated due process, and should at last be corrected.

D. Harmless-Error Analysis in *Sandstrom* cases Should Focus on Whether the Predicate Facts Triggering the Unconstitutional Presumption Proved the Elemental Fact Beyond a Reasonable Doubt

Finally, even if a reviewing court were to overlook the fact that Yates' jury probably never made *any* finding with respect to whether Davis acted with malice, petitioner submits, for the reasons stated by Justice Scalia in his concurring opinion in *Carella v. California,* ___ U.S. ___, 109 S.Ct. 2419, 2421 (1989), that harmless error analysis in *Sandstrom* cases such as this one should be limited to the determination of whether the predicate facts which were actually proven beyond a reasonable doubt so conclusively established the presumed fact that the jury may actually be said to have found " 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Rose v. Clark, supra,* 478 U.S. at 580-81. In this case, the mere facts that a defendant used a deadly weapon and committed robbery – the predicate facts triggering the presumptions of malice – clearly do not in themselves establish malice beyond a reasonable doubt. Authorized to choose between evaluating the somewhat problematic evidence of malice on the one hand, and relying on legal presumptions of malice flowing automatically from undisputed predicate facts on the other, it is unlikely that petitioner's jury undertook the more difficult task of evaluating the evidence. *Sandstrom v. Montana,* 442 U.S. 510, 526 n. 13 (1979). Because it is at least reasonably possible that the jury took advantage of its authority to convict on the strength of the presumptions rather than the evidence, a reviewing court cannot say with any certainty " 'that the jury would have found it

unnecessary to reply on the presumption[s].' " *Rose v. Clark*, 478 U.S. 570, 583 (1986) (quoting *Connecticut v. Johnson*, 460 U.S. 73, 97 (1983) (Powell, J., dissenting)). Accordingly, the errors cannot be disregarded as harmless.

Petitioner acknowledges that the Court need not decide here the issue framed by Justice Scalia's *Carella* concurrence, since the result in this case would be the same under any interpretation of this Court's harmless-error precedents. He submits, however, that should the Court wish to consider the question posed by the *Carella* concurrence, the correct answer to that question provides yet another reason why the South Carolina Supreme Court's disposition of this case did not comport with due process.

CONCLUSION

The judgment of the South Carolina Supreme Court denying the petition for writ of habeas corpus should be reversed.

Respectfully submitted,

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Petitioner,

vs.

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Respondents.

On Writ of Certiorari to the
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No. 89-7691

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

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QUESTION PRESENTED

WHETHER THE INSTRUCTION THAT THE JURY COULD PRESUME MALICE, GIVEN AT PETITIONER'S TRIAL, WAS HARMLESS ERROR UNDER ROSE V. CLARK?

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I. 18

In determining whether a Sandstrom error is harmless, a reviewing Court should follow the standard set forth in Chapman and look to the entire record to determine if the evidence presented is so overwhelming on the element presumed that no reasonable juror would have had to rely on the improper presumption to find the presumed element.

II. 25

The instruction that the jury could presume malice was harmless beyond a reasonable doubt.

A. The definition of malice and the nature of the presumption in this case. 25

B. Because the jury had only to find that Henry Davis, Petitioner's accomplice, acted with malice under South Carolina's law of accomplice liability to convict the Petitioner of murder, and because the evidence of Davis' malice is overwhelming, the improper malice instruction is harmless. 30

C. The jury instructions on malice would not have misled a reasonable juror to focus on the Petitioner's malice to the exclusion of Davis' malice. Furthermore, the evidence of Petitioner's malice is so overwhelming as to make an improper malice instruction harmless. 34

D. Although the Chapman standard is the appropriate one to use in determining whether Sandstrom errors are harmless, the instruction here would

be harmless even if the standard used is the one put forth in the concurrence in Carella v. California.
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Respondents.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The Petitioner, Dale Robert Yates, was indicted and convicted of the crimes of murder, armed robbery, assault and battery with intent to kill, and conspiracy. These crimes arose out of his participation in a scheme to commit the crime of armed robbery which occurred on Friday, February 13, 1981.

During the course of armed robbery, sixty-eight (68) year old Helen Wood was murdered by the Petitioner's accomplice and her forty-six (46) year old son, Willie Wood, was seriously wounded as a result of being shot twice by the Petitioner.

The undisputed testimony established that some ten days to two weeks prior to February 13, 1981, the Petitioner, David Eugene Loftis and possibly Henry Davis, had planned to burglarize various places in the vicinity of Greenville, South Carolina. The testimony clearly establishes that Yates along with one or both of the other men would, every two or three days, travel about the area of Greenville County "and look for some places that we might could break into, at night, while they was closed, some businesses or something; rob from there, would sell the stuff and get some money." (J.A. 35-36) According to Yates' own testimony at trial, they "weren't having too

much luck" at finding a place to burglarize "a lot of the places had burglar alarms and . . . taped glasses and windows and such." (J.A. 36) After having little luck finding an appropriate place to burglarize, Yates testified that they began to discuss the possibility "that we might could rob someone." (J.A. 36) Concrete plans to carry out an armed robbery began to formulate on Thursday, February 12, 1981. (J.A. 6, 36-37) Once the discussion turned to robbery, Davis mentioned that he had a knife that could be used as the weapon. However, Yates testified that "[w]e decided that we would need a gun to persuade whoever was behind the counter to give us the money." (J.A. 37, 6) Petitioner Yates testified that it was his idea that they should get a gun and that they could obtain one from his brother. The other men agreed and the three went to Petitioner's brother's home where they obtained the pistol which

was used in the armed robbery. (J.A. 6-8, 38-39) The night of February 12, 1981, the three men stayed together in Henry Davis' apartment. (J.A. 9, 40) The next morning on February 13, 1981, the three men left Davis' apartment and rode around together "and went looking for some suspectable [sic] places to rob." (J.A. 41, 9) After driving around most of the early part of the day without finding a suitable place to rob, the three eventually found themselves at a local mall where the girlfriend of Loftis worked. Loftis left Yates and Davis in the vehicle while he went into the mall to see his girlfriend. Shortly thereafter, Yates went into the mall to persuade Loftis to come with them so that they could carry out their plans to commit the robbery. Loftis refused to leave indicating that he had to talk to his girlfriend and that Yates and Davis should return at approximately 5:00 pm and then

they could commit the robbery. (J.A. 12-14, 44-46) Yates and Davis left Loftis at the mall some time around 3:00 pm. (J.A. 14, 46)

After leaving Loftis at the mall, Davis and Yates continued to drive around and look for possible places to rob. (J.A. 46) The two men eventually arrived at Wood's Store and decided to rob it without Loftis' help. (J.A. 51-55) At the time of the armed robbery, the only persons in Wood's Store were Willie Wood and his mother, Helen Wood. Mr. Wood was standing behind the counter next to the cash register and his mother was in a back room of the store out of sight. (J.A. 16-17) Shortly after walking in, Yates and Davis confronted Willie Wood. The testimony is undisputed that Yates was in possession of the pistol, Davis the knife. As the two men confronted Mr. Wood; Yates pointed the pistol at him and Davis brandished the knife. Yates spoke first and

demanded that Wood give them his money. Davis then repeated the demand. Upon removing the money from the cash register, Wood placed it on the counter and Davis picked it up. After picking up the money, Davis then handed it to Yates. The total amount of the money was approximately $3,000.00. According to the undisputed evidence in the record, Davis then demanded that Mr. Wood bend over the counter. Wood refused, stepped backward and suddenly Davis shouted for Yates to shoot. Yates then took aim and fired two shots at Mr. Wood. Wood was struck in the hand and chest by one of the bullets. Wood's mother, apparently hearing the shots, came out of the back room and shouted "[w]hat's going on out there?". Yates testified that he said to Davis "let's go" while turning around and heading out of the store. However, at approximately the same time Yates fired the two shots, Davis was moving around the end of the counter and

going after Mr. Wood with the knife. Apparently, as Davis approached Mr. Wood with the knife, Mr. Wood was trying to get away but was caught by Davis. Wood testified that "he [Davis] was on my back when we ended at the end of the counter before we got out into the aisle". During his testimony, Mr. Wood emphasized the fact that he did not fall after being shot by Yates, it was then that Davis came around the counter after him with the knife. (J.A. 25) Wood also re-emphasized the fact that once Davis started around the counter after him, he attempted to move away. Wood testified "I watched him because he came around the counter and started after me. And I know'd he was going to stab me in the back." (J.A. 29, 19) Wood testified that no sooner was Davis on his back than his mother arrived and attempted to grab him and pull him off. In the brief scuffle which ensued, the three "stumbled around the

counter, out into the aisle." (J.A. 19) At that time, Mr. Wood was trying to get to his pistol, which he wore as a sidearm under his coat. (J.A. 19) After struggling to pull the coat up, Wood managed to get the gun out and "started shooting [at Davis] and just pushing him on back until he couldn't go no further against the shoe boxes there. The last shot I fired, he hollered and hit the floor and the knife fell out of his hand." (J.A. 19) As soon as Davis fell, Mr. Wood noticed that his mother was on her hands and knees and she said "I believe I am dying." and blood appeared to be spurting out of her heart. Mr. Wood went to the phone and called emergency medical personnel and the sheriff's office who later came to the scene. Helen Wood died of her injuries. (J.A. 17-20, 55-57) Ms. Wood was fatally stabbed by Davis during the scuffle between herself, Mr. Wood and Davis. (J.A. 31-32)

Meanwhile, Yates appears to have run out of the store shortly after shooting Willie Wood and at about the same time the scuffle between Mr. Wood and Davis began. Yates testified that he ran out of the store and around the front of the car to the passenger side where he opened the door and got in. Yates testified that he got in the car with the money and was waiting in the passenger side for Davis to come out. After moments passed and Davis did not come out, Yates thought "'Well, he caught Henry. He grabbed Henry. No use me staying here and getting caught.' So, I jumped over under the wheel, put the car in drive, and left." (J.A. 57-58, 82)

Shortly after Yates made his getaway and the police arrived on the scene at Wood's Store, an all points bulletin was issued for the car which Yates was driving. Before Yates was able to escape the vicinity, his vehicle was noticed by

officers of the Greenville County Sheriff's Department who finally stopped Yates after a high speed chase. The record below reveals that after stopping his vehicle at the end of the high speed chase, Yates ran from the vehicle with the pistol and money in hand. He ran into some nearby woods where he was apprehended. A search of the area that Yates traveled through the woods uncovered a small paper sack containing the money stolen from the store as well as the pistol used by Yates. The paper bag was found concealed under some pine straw. (R. 961-987)

The basics of the procedural history of this case are set forth in the Petitioner's Statement of the Case and at J.A. 99-158.

SUMMARY OF ARGUMENT

First, Respondents maintain that the appropriate standard of review in determining whether Sandstrom error is harmless beyond a reasonable doubt was adequately set forth by this Court in Rose v. Clark, 478 U.S. 570 (1986). In Rose, the question presented was "whether the harmless error standard of Chapman v. California 386 U.S. 18 (1967), applies to jury instructions that violate the principles of Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985)." Id. at 572 In Rose this Court resolved this issue in the affirmative. Because Chapman permits a reviewing Court to look at the whole record, including the testimony and evidence presented, in determining whether error is harmless, the State Supreme Court utilized the appropriate standard below. (J.A. 149)

The Court below properly focused on Davis' malice in determining whether the

instruction that the jury could presume malice was harmless. The error in the Petitioner's argument is that he neglects to define the term "malice" as it is understood in South Carolina law. "Malice" as the term is properly understood, is neither the intent to kill, nor motive. It is because Petitioner obscures the definition of malice and at times makes it appear as though malice is the equivalent of the intent to kill that he is able to argue that the evidence of Davis' malice was not so overwhelming as to make the challenged instruction harmless beyond a reasonable doubt. When malice is properly understood as "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief" is clear that the evidence of Davis' malice is in fact overwhelming. State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941).

When malice is properly distinguished from the intent to kill and motive, the Petitioner's arguments fail. From the facts of this case, it is undisputed that Davis had not only engaged in the lengthy planning of an armed robbery, but participated in its execution. The facts of this case also undisputedly show that it was Davis who went after Willie Wood with a knife after Wood was shot by Yates. Testimony also reveals that Wood was trying to get away from Davis as Davis approached him with a knife. Petitioner's claim that Davis was not acting maliciously as that term is defined in the law of South Carolina is totally without foundation. Whether or not Davis had a specific intent to stab and kill Helen Wood is irrelevant. The question is whether Davis had a malicious state of mind at the time he killed Ms. Wood, not whether he specifically intended her death. For this reason, the jury instruction in question had

no bearing on whether or not the jury could have found Davis' stabbing of Helen Wood to be an accident. The challenged jury instruction did not require the jury to presume an intent to kill, but to presume malice which is not the same thing as the intent to kill.

Instructions given to the jury on the law of accomplice liability are sufficiently clear so that a reasonable jury would have understood that it was necessary to make a finding as to Davis' malice in order to convict Yates of murder. (J.A. 96-98) Second, even assuming that Petitioner is correct in arguing that the jury instructions as given would have focused the jury on Yates' malice, the improper presumption charge is still harmless because the evidence of Yates' malice is also so overwhelming that no reasonable juror could have concluded that it did not exist. Petitioner seems to argue that once the

instructions focused the jury's attention upon the issue of Yates' malice, then the improper presumption would have prevented the jury from properly considering two important facts regarding his mental state. As stated by Petitioner these facts pertain to his intent in agreeing to help Davis carry out an armed robbery which involved the possible taking of another life, and whether he had sufficiently withdrawn from the criminal scheme prior to the killing so as to relieve him of liability for the murder. (Petitioner's Brief p. 17) Once malice is properly understood as being distinct from the intent to kill it is clear that the evidence is overwhelming regarding Yates' malice. Specifically, under the law of accomplice liability in South Carolina, one need not intend or even entertain the actual expectation that a life may actually be taken in order to be convicted of murder. (J.A. 150) As regards to the issue of

withdrawal, there is simply no evidence in the record whatsoever that Yates withdrew as withdrawal is understood under South Carolina law. (J.A. 98) The only evidence in the record is that Yates was still involved in the criminal enterprise even after he left the store. The undisputed evidence is that Yates entered the passenger side of the car with the money in hand. He then waited for Davis to come out so that they could make their escape together. He then drove away, not in an effort to abandon the criminal enterprise, but because he believed that something had happened to Davis and so that he could avoid capture. See, Respondent's Statement of the Case, supra. That Yates had not abandoned the criminal enterprise upon leaving Wood's Store was also made evident by the fact that he took the money out of the store with him and attempted to hide it in the woods prior to being apprehended by the police. See,

Respondent's Statement of the Case, supra. There is simply no evidence that Yates withdrew or ever intended to withdraw from the criminal enterprise.

ARGUMENT

I.

In determining whether a Sandstrom error is harmless, a reviewing Court should follow the standard set forth in Chapman and look to the entire record to determine if the evidence presented is so overwhelming on the element presumed that no reasonable juror would have had to rely on the improper presumption to find the presumed element.

In Francis v. Franklin, 471 U.S. 307 (1985) and Rose v. Clark, 478 U.S. 570 (1986), this Court set forth the standard for determining whether a jury instruction constituted Sandstrom error, and if so, whether that instruction was harmless beyond a reasonable doubt. In determining whether a particular jury instruction violates Sandstrom, the test is two-fold.

> Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered an isolation, could reasonably have

> been understood as creating a presumption that relieves the State of its burden of persuasion on an element of the offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. [citations omitted] This analysis "requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction."

Francis, 471 U.S. at 315. It was not until this Court's decision in Rose that the issue was squarely raised as to "whether the harmless-error standard of Chapman v. California [citation omitted], applies to jury instructions that violate the principles of Sandstrom v. Montana [citation omitted] and Francis v. Franklin [citation omitted]." Rose, 478 U.S. at 572. The majority of the Court in Rose concluded specifically that the Chapman harmless error

standard was applicable in cases involving Sandstrom error.[1] Id. at 584 Once the test

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[1]Many of the federal Courts of Appeals are in accord:
Quigley v. Vose, 834 F.2d 14 (1st Cir. 1987);
Payne v. LeFevre, 825 F.2d 702 (2nd Cir. 1987);
United States v. Clemons, 843 F.2d 741 (3rd Cir. 1988);
Bates v. Blackburn, 805 F.2d 569 (5th Cir. 1986);
United States v. Mentz, 840 F.2d 315 (6th Cir. 1988);
Jacks v. Duckworth, 857 F.2d 394 (7th Cir. 1988);
Ruff v. Kincheloe, 843 F.2d 1240 (9th Cir. 1988);
McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988);
Myrich v. Maschner, 799 F.2d 642 (10th Cir. 1986);
Collins v. Zant, 892 F.2d 1502 (11th Cir. 1990) and
Lancaster v. Newsome, 880 F.2d 362 (11th Cir. 1990).

Many state courts are also in agreement:
People v. Bunyard, 756 P.2d 795 (Ca. 1988);
People v. Odle, 754 P.2d 184 (Ca. 1988);
State v. West, 568 So. 2d 1019 (La. 1990);
Alexander v. Texas, 757 S.W.2d 95 (Tex. Cr. App. 1988);
State v. Coleman, 544 A.2d 194 (Conn. 1988);
Hunter v. State, 740 P.2d 1206 (Ok. 1987);

enunciated in Francis is applied to the instruction and it is determined that the jury instruction taken as a whole contains Sandstrom error, then the reviewing Court must apply the Chapman standard to determine whether the Sandstrom error was harmless beyond a reasonable doubt.

> "Chapman mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." [citations omitted] The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." [citations omitted] . . . in cases of Sandstrom error, "the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption."

Rose, 478 U.S. at 583. A careful reading of this Court's decisions clearly and

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State v. Jensen, 735 P.2d 781 (Ar. 1987) and
Morrison v. Holland, 352 S.E.2d 46 (W.Va. 1986).

unequivocally reveals that a majority of this Court has already concluded that the Chapman standard for determining harmless error is applicable in cases of Sandstrom error.[2]

In his brief, the Petitioner maintains that there is still some dispute regarding the proper standard to be used for determining harmless error in Sandstrom cases. (Petitioner's Brief pp. 35-36) In support of his position, Petitioner cites to the concurring opinion in Carella v. California, _____ U.S. _____, 57 U.S.L.W. 4731, 4733 (1989). According to the concurrence in Carella, the proper focus for determining whether Sandstrom error was harmless is not upon the whole record. Rather, the focus would appear to be more narrow in that it is limited only to the

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[2]This point is implicit in this Court's decision in United States v. Frady, 456 U.S. 152 (1982) and explicit in this Court's decision in Pope v. Illnois, 481 U.S. 497 (1987).

predicate facts underlying the erroneous presumption. The question then becomes whether "the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." Carella 57 U.S.L.W. at 4733. It is this test set forth in the concurring opinion in Carella which the Petitioner ultimately maintains should be applied to the facts of this case.

Respondents maintain the issue regarding the appropriate standard was conclusively resolved in Rose. This is clearly evident from a careful reading of the Rose decision. It appears that the very concerns and arguments raised by the concurrence in Carella were considered by a

majority of this Court in Rose and resolved in favor of the traditional Chapman test. Rose, 478 U.S. at 580-582 and 572 n. 1. Therefore, Respondents will argue that the Sandstrom error, if any, in this case was harmless beyond a reasonable doubt under the Chapman standard adopted by this Court in Rose. However, Respondents will also maintain that even applying the test set forth by the concurrence in Carella, the Sandstrom error in this case is still harmless beyond a reasonable doubt.

II.

The instruction that the jury could presume malice was harmless beyond a reasonable doubt.

A. The definition of malice and the nature of the presumption in this case.

In order to understand why the malice instruction in this case is harmless beyond a reasonable doubt one must first understand precisely how malice is defined and also that it is distinct from the intent to kill and motive. In this vein, it is important to keep in mind that the principle cases which the Petitioner relies upon to establish the incorrectness of the malice instruction here, Sandstrom and Francis, are cases which concern mandatory presumptions regarding the intent to kill, not malice as defined under the law of South Carolina and by the trial court in this case. Perhaps the clearest definition of malice in the State of South Carolina was set forth by the

State Supreme Court in State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941);

> In its popular sense the term 'malice', conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual injured, but signifies general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse or extenuation, and malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse. (emphasis added)

With this definition clearly in mind, it can easily be seen that malice as defined in South Carolina law and by the trial court in this case is distinct from the intent kill and motive. As opposed to motive, malice does not require that one have ill-will or hostility toward a particular individual for any particular reason, rather it signifies a

mental state which is reckless of the lives and safety of others in general. Likewise, with the above definition of malice in mind, it is easy to see how it is distinct from an intent to kill. In order to fully understand the significance of the definition of malice and role which it plays in murder cases as such as this, it is important to keep in mind that under South Carolina law it is possible to commit an intentional killing with malice, which is murder, and to commit an intentional killing without malice, which is not murder.[3]

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[3]Voluntary manslaughter, which is a lesser included offense of murder in South Carolina, is an intentional killing without malice. It is the element of malice which distinguishes voluntary manslaughter from murder. State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978) and State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984). Likewise, one can be convicted of murder even though one does not have the intent to kill, provided that one does have malice. State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672, 675 (1957) ("although it may be fairly assumed that there is no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard

In the course of the trial judge's charge he explained malice as follows:

> Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief . . . malice is implied or presumed by the law from the willful deliberate and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, also, that malice is implied or presumed from the use of a deadly weapon. (emphasis added.)

(J.A. 96) Upon reviewing this language, the State Supreme Court noted two erroneous instructions:

> Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge chjarged the jury: "malice

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of human life, from which a jury could infer malice.") And State v. Webb, _____ S.C. _____, 389 S.E.2d 664 (1990).

> is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon ... [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

(J.A. 151)

Before proceeding to a detailed analysis of why the presumption charge in this case is harmless, it must be made clear that malice is defined as "a general malignant reck-lessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief". Heyward, supra.[4] Another point, obfuscated in Petitioner's Brief, which has now been made clear is that malice is not the intent to kill. It is

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[4]In its charge, the trial court stated, "[Malice] is something which springs from wickedness from depravity, from a depraved spirit, from a heart devoided of social duty, and fatally bent on creating mischief." (J.A. 96)

with this understanding that we proceed to the question of whether or not the trial court's charge on malice is harmless error.

B. Because the jury had only to find that Henry Davis, Petitioner's accomplice, acted with malice under South Carolina's law of accomplice liability to convict the Petitioner of murder, and because the evidence of Davis' malice is overwhelming, the improper malice instruction is harmless.

As the State Supreme Court noted, the key to understanding why the presumption was harmless is that it was Davis' malice which was most relevant and not Yates'.[5] (J.A. 151) First, the precise definition of malice set forth above and by the trial court below must be kept in mind. State v. Heyward, supra, and J.A. 96. The question then is whether Davis' actions show "recklessness of the lives and safety of

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[5]The State Supreme Court was duty bound to engage in a harmless error analysis. "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." United States v. Hasting, 461 U.S. 499, 509 (1983).

others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief."

State v. Heyward, supra. Following the standard set forth in Rose and Chapman, the issue is whether the evidence is so overwhelming as to Davis' malice, properly defined, that the reviewing court can say beyond a reasonable doubt that no reasonable juror would have had to rely on the improper presumption to find it. With malice properly defined and distinguished from the intent to kill, it is clear from the facts of this case that the only evidence in the record is that Davis did act with malice. Davis' specific intent to kill was unaffected by the presumptive language. Once again, and as noted above, the presumption here, unlike the presumptions involved in Sandstrom and Francis, did not direct the jury to presume the intent to kill from predicate facts, but rather malice which is

distinct from intent. The facts of this case undisputedly reveal that Davis was active in the planning and commission of an armed robbery. They reveal that he was armed with a deadly weapon, a knife, throughout the entire crime. The undisputed testimony in the record also reveals that it was Davis who directed Yates to shoot Willie Wood. The undisputed evidence in the record also indicates that after directing Yates to fire on Willie Wood, Davis went around the counter after Wood, presumably chasing him, and was in all probability attempting to stab him with the knife. It is this evidence which is overwhelming evidence that Davis had malice in his heart throughout the commission of this crime and at the time he fatally stabbed Helen Wood. At the risk of emphasizing the point too much, it is irrelevant whether or not Davis specifically intended to kill Ms. Wood. Davis did not need a specific intent to kill Ms. Wood to

be guilty of murder himself or to have acted with malice. Because the evidence is so overwhelming that no reasonable juror would have had to rely on the presumption in order to find malice, and because the presumptive language did not direct the jury to presume an intent to kill on the part of Davis, the State Supreme Court was correct in concluding that the error was harmless beyond a reasonable doubt. Given a proper definition of malice, it is clear that Davis could not have claimed that he stabbed Helen Wood by accident. Furthermore, because the presumption in question would have only focused the jury's attention upon Davis' malice and not his intent to kill Helen Wood, the jurors consideration, if any, of whether Davis accidentally stabbed Helen Wood would not have been affected by the presumption.

C. **The jury instructions on malice would not have misled a reasonable juror to focus on the Petitioner's malice to the exclusion**

of Davis' malice. Furthermore, the evidence of Petitioner's malice is so overwhelming as to make an improper malice instruction harmless.

As the State Supreme Court noted the key is the malice of Henry Davis. (J.A. 151) After setting out the elements of murder, including malice, for the jury's consideration, the trial court then specifically charged the jury "[a]nd it ultimately remains the responsibility of you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." (emphasis added) (J.A. 96-97) With language this plain and this evident, it is difficult to imagine how a reasonable juror could have interpreted this charge in such a way as to have not focused on Davis' malice. As this court noted in Francis, "[t]he Court presumes that jurors, conscious of the gravity of their task, attend closely

to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (emphasis added) Francis, 471 U.S. at 324, n. 9. Whatever else the jurors drew from the trial court's instructions they must have understood that it was necessary to consider Davis' malice in order to find Yates guilty of murder under the theory of accomplice liability. In this respect, the charge is crystal clear. Nothing in the charge could have led a reasonable juror to include that they did not have to find that Davis acted with malice in order to convict Yates.

Furthermore, given the trial judge's charge on the law of accomplice liability and the facts of this case, it is not possible that a reasonable juror could have disregarded that portion of the trial court's charge in finding Yates guilty of

murder. The jurors had to find Yates guilty of murder under the accomplice liability portion of the trial court's charge, they could have done nothing else given the undisputed facts of this case. The undisputed facts of the case are that Yates did not murder Helen Wood. On this point, the facts, the Petitioner and the Respondents are in complete agreement. Yates is guilty of murder only in so far as he is an accomplice with and aiding and abetting Henry Davis in the course of the armed robbery. Under these facts, the jurors had to find Yates guilty under the following portion of the charge:

> Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or

natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present, or participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused which proximately lead to the accomplishment of the criminal purpose. the commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commission of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or some ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original

> unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

(J.A. 97-98) Under this instruction, which under these facts absolutely must have been considered by the jury, the jury could not have erroneously convicted Yates as a result of the improper malice instruction. Once again, remembering the proper definition of malice and the precise language of the presumptive malice instruction, the improper charge would not have eclipsed the jury's consideration of the above referenced portion of the trial court's charge. Given the particular facts of this case, any reasonable jury would have had to have convicted Yates under the above referenced portion of the charge.

Assuming, but in no way conceding that a reasonable jury could have been misled by the trial court's instructions to focus on Yates' malice, the error is still harmless

beyond a reasonable doubt because the evidence of Yates' malice is overwhelming. Given the charge presented here, no reasonable juror could have focused on Yates' malice to the exclusion of Davis'. At worst, a reasonable juror would have interpreted the instructions in such a manner as to have concluded that it was necessary to find that Davis had malice, or that both Davis and Yates acted with malice. In essence, a reasonable juror under these instructions would have necessarily had to focus on Davis' malice. The only question is whether the instructions would have also permitted the reasonable juror to conclude that Yates acted with malice also. However, even assuming this interpretation, the evidence that Yates acted with malice - malice properly defined - is so overwhelming that no reasonable juror would have had to rely on the improper presumption to find malice.

The Petitioner argues that the improper malice instructions could have confused the jury with regard to two facts which are relevant to his guilt or innocence. The first, pertains to "whether Yates' intent in agreeing to help rob the Wood Store encompassed a probable homicide" and second, "whether Yates had sufficiently withdrawn from the criminal enterprise prior to the killing to free him from liability as an accomplice". (Petitioner's Brief p. 17). The Respondents will consider each of these facts in turn and how the alleged improper malice instruction might have affected the jury's consideration of them.

Regarding the first fact pertaining to whether Yates' intent to assist Davis in robbing the Wood's Store encompassed a probable homicide, the improper malice instruction could not have affected a reasonable juror's consideration of this fact. Once again, the appropriate

definition of malice must be kept firmly in mind. Malice is not the intent to commit a homicide, it is not the intent to kill. This is the very point which the Petitioner obfuscates throughout his entire brief. Furthermore, the intent that a homicide occur or the reasonable expectation on the part of an accomplice that a homicide is even reasonably likely is not a necessary element of accomplice liability for murder. First, regarding the definition of malice, it can be no doubt but that Yates acted maliciously - as the term is properly defined - in planning to commit an armed robbery, actually committing an armed robbery, threatening Willie Wood with a deadly weapon, and actually shooting him among other things. Yates clearly acted maliciously as malice is properly defined. The only evidence in the record is that Yates acted with malice. Also, as previously noted, the doctrine of accomplice

liability for murder does not require that the accomplice intend that a homicide occur or even reasonably expect that one is likely. The accomplice's, in this case Yates', subjective mental state regarding intent is not necessarily relevant. The doctrine of accomplice liability was succinctly stated by the State Supreme Court in its opinion below.

> Under State Law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide.

(J.A. 150) What is necessary under the doctrine of accomplice liability for murder is that the jury be charged that the crime, in this case armed robbery, which the parties combined to commit and/or the manner in which they committed it was such that a homicide could result as "a probable or natural consequence thereof." (J.A. 150)

The jury does not have to be charged that to find one guilty of accomplice liability for murder that the accomplice actually intended that a death result or subjectively expect that a death was likely. It was only necessary that the jury find that the crime which the parties combined to commit and/or the manner in which they committed it could lead to the death or killing of another individual. Once the doctrine of accomplice liability is properly understood, it is clear that Yates' subjective intentions regarding the taking of another life were not necessarily relevant. This was most recently reaffirmed by the State Supreme Court in its recent decision in Thrift v. State, _____ S.C. _____, 397 S.E.2d 523 (1990).[6] Given an appropriate understanding

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[6]In Thrift, the State Supreme Court approved the following charge on the doctrine of accomplice liability. "If two or more combine together to commit an unlawful act, such as robbery and in the execution of that criminal act a homicide is committed by one of the actors as a probable

of the definition of malice, as well as an understanding of precisely what is required under the doctrine of accomplice liability, it is clear that the Petitioner's intent regarding the possibility of a homicide is irrelevant and was not eclipsed as a result of the malice instruction.

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and natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. The common purpose may not have been to kill another, but if it was unlawful, as for instance to break in and steal and in the execution of the common purpose a homicide is committed by one as a probable or natural consequence of the acts done in pursuant to the common design, then all present participating in the unlawful common design are as guilty as the slayer." Thrift 397 S.E.2d at 526. While this case only raises issues pertaining the Petitioner's conviction not his death sentence, it is worth noting that the death sentence has been held not to be inappropriate in cases such as this. Enmund v. Florida, 459 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137, 152 (1987) (Eighth Amendment does not prohibit the death penalty for one "whose participation is major and whose mental state is one of reckless indifference to the value of human life.")

The next point which the Petitioner claims to have been eclipsed by an improper malice instruction pertains to whether he had sufficiently withdrawn from the criminal enterprise prior to the killing. Petitioner claims that the presumptive instruction prevented the jury from properly considering this and, therefore, his very guilt under the doctrine of accomplice liability is called into question. This is perhaps the most ludicrous of the Petitioner's claims. The trial judge below accurately set forth the law of withdrawal in his charge.

> One who is joined in a common design to kill or commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, notwithstanding any attempted withdrawal from the

> original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with resulting lack of responsibility for a homicide committed by a confederate.

(J.A. 98) As Respondents have noted several times earlier, given the proper definition of malice coupled with this charge on the law of withdrawal, there is simply no evidence of the Petitioner's withdrawal. No reasonable juror could have conceivably concluded that the Petitioner withdrew or ever intended to withdraw from the criminal enterprise. First, given a proper understanding of the definition of malice, it in no way affected the jury's

consideration of this issue. The record is clear and unequivocal in that the Petitioner ran out of Wood's Store with his pistol and the money in hand. He went to the passenger side of the vehicle, got in and waited on Davis. Nothing whatsoever about the Petitioner's conduct either inside Wood's Store or immediately outside is even suggestive of an intent or desire on his part to withdraw from the original criminal enterprise, which was armed robbery. The Petitioner left the store with the money, the gun and waited on his accomplice prior to driving away in order to avoid detection. Petitioner's own testimony at trial is that he left not in an effort to abandon the criminal enterprise, but because he believe his accomplice Davis had been caught and so that he could avoid detection and apprehension. Nothing whatsoever about Petitioner's behavior and conduct could possibly lead a reasonable juror to conclude

that he had any intention of withdrawing from the criminal enterprise as this is understood in the law. Furthermore, assuming but in no way conceding that the malice instruction had some bearing on the jury's consideration of the issue of withdrawal, the evidence of Yate's own malice, as properly defined, is so overwhelming that a reasonable juror would have found it in the absence of the presumption. As such, the presumption itself had no bearing on the issue of Yates' withdrawal.

D. Although the Chapman standard is the appropriate one to use in determining whether Sandstrom errors are harmless, the instruction here would be harmless even if the standard used is the one put forth in the concurrence in Carella v. California.

In Carella the concurrence noted that typical harmless error analysis under Chapman permitted and even required consideration of the trial record as a whole. However, the concurrence in Carella objected to this approach when dealing with errors of the Sandstrom type, and instead urged the Court to adopt the following test.

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings functionally equivalent to finding the element required to be presumed. The error is harmless because it is "beyond a reasonable doubt" [citation omitted], that the jury found the facts necessary to support the conviction.

Carella, 57 U.S.L.W. at 4733. Under this inquiry the focus is not upon trial record as a whole, but rather upon the predicate facts which form the basis for the presumption. The question then becomes whether the jury could not have found the presumed fact given the predicate facts which it is was required to find. Here, however, predicate facts and the presumed fact were so closely related as to make the finding of the predicate facts "functionally equivalent" to finding the presumed fact. Id. at 4733.

Petitioner argues that "[i]n this case, the mere facts that defendant used a deadly weapon and committed robbery - the predicate facts triggering the presumptions of malice - clearly do not themselves establish malice beyond a reasonable doubt." As with his other arguments, Petitioner's argument in this regard rests upon his failure to understand the proper definition of malice

and its implications. First, the trial court defined the phrase "deadly weapon" as follows:

> I tell you that a deadly weapon, within the meaning of the law is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

(J.A. 95) The trial court defined the crime of armed robbery, robbery committed with the use of a deadly weapon as follows:

> Ladies and gentlemen, armed robbery in this State is the felonious taking and carrying away of personal property or money of another person from his or her person or in his or her presence by violence or putting that person in fear and by the use of a deadly weapon. Robbery includes larceny, ... All of the elements necessary to constitute larceny are necessary to constitute robbery; and in addition to the taking of another person's property, it requires that it be taken by putting that person in fear and by the use of a deadly weapon.
>
> To make out the offense of armed robbery, it is necessary for the State to show that the money or personal propery of another person has been taken. And after taking it, it was carried away; that the

taking and carrying away was with the intent of depriving the owner of his property or money. Fourthly, that the money or property was taken from the person or another but it is sufficient in the law if it was taken from his presence, from the area in which he personally was. It need not be taken out of his pocket, but just from his presence.

Fifthly, the taking must not only be without the consent of the owner, but it was accomplished with violence or by putting the person in fear for his safety or well-being. The additional and last element of the charge of armed robbery is that such fear and violence was committed with the use of a deadly weapon; that is to say, the person or persons who committed the crime actually had and used a deadly weapon to obtain the possession of the property of another by putting him in fear for his safety by the use of that weapon.

(R. 1205-1206) Remembering that malice is defined as "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows the heart regardless of social duty and fatally bent on mischief" it is not difficult to see how the predicate facts of robbery with the use

of a deadly weapon clearly establish malice. Heyward, 15 S.E.2d at 671. With the crime of armed robbery and the phrase "deadly weapon" defined as they are under the law of the State of South Carolina, it is difficult to understand why and how the test set forth in the concurring opinion in Carella is not satisifed by the predicate facts of this case. While malice is not an element of armed robbery, it is difficult to see how armed robbery, as defined, could be committed by someone without malice. Because the crime of armed robbery cannot be committed without malice, even though malice is not an element of armed robbery, it is clear that the predicate facts here "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact [of malice]". Carella, 57 U.S.L.W. at 4733.

CONCLUSION

The Respondents maintain that the proper standard of review to determine wherther the Sandstrom errors are harmless is that set forth in Chapman v. California and approved by this Court in Rose v. Clark.

Applying the Chapman standard to this case, it is clear that the malice instructions are harmless beyond a reasonable doubt. Because the Petitioner has neglected to focus on the proper definition of malice and has confused it with the intent to kill, his arguments that the malice instructions improperly affected the jury's verdict must fail. Malice is not the intent to kill and when properly understood it is clear that the presumptive instructions on malice are harmless under Chapman and Rose. Specifically, evidence of Henry Davis' malice is overwhelming. No reasonable juror could have concluded that Henry Davis did not act with malice.

Because of the nature of the definition of malice the presumptive instructions did not in any way eclipse the jury's consideration of Davis' intent. In any event, Davis' specific intent to stab Helen Wood is not even controlling as to whether he is guilty of murder of South Carolina law.

Furthermore, the instructions on malice are not ambiguous as Petitioner argues. The instructions clearly focused the jury's attention on Davis' malice which was the key for purposes of the law of accomplice liability. However, assuming that the jury did consider Yates' malice, this could not have affected their verdict. This is so because, (1) the evidence of Yates' malice is also so overwhelming that no reasonable juror could have doubted it and, (2) malice as properly defined and as instructed has nothing whatsoever to do with Yates' intent that a homicide occur or his intent to withdraw from the criminal enterprise.

Because malice is distinguishable from intent, the presumptive instruction could not have adversely affected the jury's consideration of Yates' specific intent regarding whether or not a homicide would occur or his intent to withdraw.

Assuming but in no way conceding that the Carella concurrence is correct with respect to the appropriate standard to apply to Sandstrom error, the malice instruction is still harmless. Given the definition of "deadly weapon" and the crime of armed robbery, a juror could not find these predicate facts which are overwhelmingly supported by the record, and to fail find malice.

For all these reasons, the judgment of the Supreme Court of the State of South Carolina should be affirmed.

Respectfully submitted,

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December 17, 1990
Columbia, South Carolina.

No. 89-7691

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

AFFIDAVIT OF FILING

PERSONALLY appeared before me, MILLER W. SHEALY, JR., who being duly sworn, deposes and says that he a member of Bar of this Court and that on this date he filed the original and forty copies of Brief of Respondents in the above captioned case by depositing same in the United States Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 17th day of December, 1990.

MILLER W. SHEALY, JR.

SWORN to before me this 17th
day of December, 1990.

Patricia D. Bryant (L.S.)
Notary Public for South Carolina

My Commission Expires: 6-9-98.

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, MILLER W. SHEALY, JR., who being duly sworn, deposes and says that he served the foregoing Brief for Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to David I. Bruck, Esquire, Post Office Box 12249, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 17th day of December, 1990.

MILLER W. SHEALY, JR.

SWORN to before me this 17th
day of December, 1990..

(L.S.)
Notary Public for South Carolina

My Commission Expires: 6-9-98.

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ARGUMENT IN REPLY

The most striking aspect of respondents' argument is its implicit concession that the evidence could have left a properly-instructed jury with a reasonable doubt as to whether Davis' killing of Helen Wood was intentional. *See* Brief of Respondents at 29-33. Far from disagreeing with petitioner's interpretation of the record on this point, respondents have instead presented a potpourri of alternative theories under which the unconstitutional presumptions of malice might still be deemed harmless. Respondents variously offer the following:

> (1) that malice was overwhelming proven under a "recklessness" theory of murder; Brief of Respondents at 25-30;
>
> (2) that malice was overwhelmingly proven under a transferred-intent theory, Davis allegedly having killed Helen Wood while trying to murder Willie Wood, *id.*, 31-33; and
>
> (3) that malice was conclusively established in connection with Helen Wood's death simply by the robbery and shooting which immediately preceded it. *Id.*, 50-53.

As an initial matter, none of these alternative theories was presented to the jury by the trial judge's instructions, and none of them forms any part of the state supreme court majority's discussion of harmless error in this case. *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530 (1989); J.A. 149-152. Rather, the state supreme court simply appears to have based its judgment on an exaggerated rendition of the record evidence of Davis' intent to kill Mrs. Wood. *Id.*, J.A. 150-151 (court describes Davis as having "lunged at Mrs. Wood with his knife," and as having inflicted a "multiple stabbing"). Respondents have apparently now

abandoned this factually erroneous basis for the state supreme court's harmless-error finding. However, as will be seen, respondents' various substitute rationales cannot be sustained under South Carolina law, and the state supreme court's failure to embrace any of them is not difficult to understand.

A. Even assuming that the jury understood its task to involve a determination of Davis' mental state, the evidence of his malice was far from overwhelming.

1. Malice requires more than mere recklessness

Respondents strenuously insist that the element of malice does not require a specific intent to kill, but only recklessness. Brief of Respondents at 26-27 (malice "signifies a mental state which is reckless of the lives and safety of others"). Because Davis was at least reckless in robbing and struggling with Willie Wood at knife point, respondents argue, his killing of Mrs. Wood was necessarily malicious even if unintentional, and the unconstitutional presumptions of malice were therefore harmless.

This argument both misstates the applicable state law, and lacks support in the record of this case. As a matter of South Carolina law, mere recklessness is *not* sufficient to prove malice. A reckless killing constitutes the offense of involuntary manslaughter, not murder. S.C. Code §16-3-60 (1985) (defining the element of criminal negligence in involuntary manslaughter as "the reckless disregard of the safety of others."). Respondents are correct that murder does not require a specific intent to kill a particular individual: even absent a specific intent to kill, a defendant may exhibit a recklessness so extreme as to

be equivalent to intent, and in such cases, the element of malice is established. *State v. Mouzon*, 231 S.C. 655, 99 S.E.2d 672 (1957); LaFave & Scott, 2 *Substantive Criminal Law* 199-206 (1986). But "[o]bviously this degree of recklessness must involve more egregious conduct than that 'reckless disregard for the safety of others' which is the statutory definition of the criminal negligence predicate to an involuntary manslaughter prosecution." McAninch & Fairey, *Criminal Law of South Carolina* 85 (2d ed. 1989). *State v. Mouzon, supra*, on which respondents rely, makes this clear: for an unintentional killing to constitute murder, there must be "evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice." *Id.*, 231 S.C. at 677, 99 S.E.2d at 675.

To be sure, the evidence in this case might have justified a jury finding (had the jury been instructed to consider the issue) that Davis acted with so extreme a degree of recklessness as to amount to malice. But the evidence surely did not *compel* such a finding: whether Davis' recklessness in the death of Mrs. Wood was merely criminal, S.C. Code §16-3-60, or actually "malignant," *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669, 671 (1941), was undeniably a matter on which reasonable jurors could differ.[1]

---

[1] This is especially true in view of the subtlety of the distinction between the mental states required for involuntary manslaughter and "depraved-heart" murder. Such distinctions "are, of course, matters of degree, and there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another." LaFave & Scott, *supra*, at 200.

In any event, petitioner's jury did not consider any of this, because the trial court did not instruct the jury on unintentional or "depraved-heart" murder. On the contrary, the trial court used the term "malice" interchangeably with "intent to kill." Specifically, the trial judge stated that "[m]alice may be expressed . . . [by] circumstances which show directly that *an intent to kill* was really and actually entertained." J.A. 96 (emphasis added). He went on to introduce the concept of implied malice as follows: "Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, *it is indirectly and necessarily inferred* from facts and circumstances which are, themselves, proved." *Id.* (emphasis added). Under these circumstances, and given that the trial judge at no time suggested that the malice required for murder could be anything less than a wrongful intent to kill, respondents' misleading equation of murder and involuntary manslaughter under South Carolina law would have had no relevance to this case even if it had fairly reflected the state law involved.

2. The record does not support respondents' transferred-intent rationale for harmless error

While it is not entirely clear from their brief, respondents also appear to be arguing that Davis' malice was overwhelmingly proven on a separate theory of *transferred* intent to kill – namely, that Davis killed Helen Wood while attempting to kill Willie Wood. Respondents correctly assert that malice may be shown by evidence that the accused accidentally killed one person while intentionally attempting to murder someone else. *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669 (1941). But there are

two reasons why this well-settled proposition of law is irrelevant here.

The first reason is that the state did not rely on a theory of transferred intent, the trial judge did not charge it, the jury presumably did not consider it, and the state supreme court's opinion includes no factual findings to support it. The second reason is that the evidence that Davis was attempting to kill Willie Wood when Helen Wood was stabbed is by no means overwhelming. The only pertinent testimony – that of Willie Wood – paints a rather confusing picture of what transpired during the few seconds between the start of the robbery and the stabbing of Mrs. Wood. J.A. 18-19, 25-29. While the state sought at trial to have the jury draw the inference that Davis intended to kill Willie Wood, a properly-instructed jury might just as easily have concluded that Davis was only attempting to avoid being shot as he scuffled with Wood, and that Wood's recollection of the events was colored by his understandable hatred of Davis, and by his need to justify his having shot Davis to death. In weighing this evidence, a reasonable juror might well have concluded that Davis would have succeeded in stabbing Willie Wood had he in fact intended to do so, especially in light of Wood's claim that the knife-wielding Davis had grappled with him before Wood was able to extricate his pistol from inside his windbreaker. J.A. 25-26. Under all the evidence presented, it is by no means certain that petitioner's jury would have found Mrs. Wood's killing to be murder under a theory of transferred intent had such a theory been charged, and respondents' rather modest claim that Davis was "in all probability" attempting to stab Willie Wood just before Mrs. Wood's death hardly

suffices to establish the harmlessness of the two burden-shifting presumptions of malice. Brief of Respondent at 32.

3. Participation in a felony does not automatically establish the malice required for murder under South Carolina law

Near the end of their brief, respondents advance yet a third legal theory which is said to remove the element of malice from controversy, and thus to render harmless the unconstitutional instructions. According to respondents, the fact that the crime of armed robbery necessarily involves malice automatically renders malicious any ensuing homicide. Brief of Respondents at 53. As a matter of South Carolina law, this is simply wrong. South Carolina law merely permits, but does not require, the jury to find malice from the commission of a felony. A clear recent illustration of this is found in *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985). In *Norris*, a capital rape-murder prosecution, the trial judge informed the jury that it *could* infer malice if it concluded "that the homicide was a proximate, direct result of the commission of a felony," and if the defendant "was in the commission of a felony at the time of the fatal blow." When the jury subsequently inquired "whether or not death during the commission of . . . a felony . . . constitute[s] malice," the trial judge stressed that this inference of malice was purely permissive, and was simply one of the facts and circumstances which the jury should take into account in determining whether malice had been proven. 285 S.C. at 91, 328 S.E.2d at 342. Approving these instructions, the South Carolina Supreme Court emphasized that "South

Carolina . . . makes no distinction between murder and felony-murder," *State v. Yates*, 280 S.C. 29, 38, 310 S.E.2d 805, 810 (1982), *cert. denied*, 462 U.S. 1124 (1983), J.A. 106, and reminded the state's trial judges of the permissive nature of the inference of malice from an intentional killing during the commission of a felony. 285 S.C. at 92, 328 S.E.2d at 342-343. *Accord*, *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *see also*, *State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585, *cert. denied*, 456 U.S. 938 (1982) (instruction on lesser-included offense of involuntary manslaughter not required in robbery-murder prosecution only because second shot to head of victim was undeniably intentional). Respondents acknowledge none of this well-established South Carolina law, but seek instead to salvage petitioner's conviction by invoking a non-existent state rule of felony-murder.[2]

B. The trial court's instructions did not clearly require the jury to make any finding concerning whether Davis acted with malice

Although the South Carolina Supreme Court cited no basis in the record for its apparent assumption that the jury understood its task to be to determine whether *Davis*

---

[2] It might be recalled that the South Carolina Supreme Court found only that the evidence "made a jury issue as to the murder charge" under an accomplice liability theory. *State v. Yates*, 280 S.C. 29, 38, 310 S.E.2d 805, 810 (1982), J.A. 106. Under respondents' view of South Carolina law, by contrast, no such jury issue actually appears, because Yates' in-court admission that he participated in a robbery of the Wood store would be tantamount to a plea of guilty to Mrs. Wood's murder.

acted with malice when he killed Helen Wood, and although two of that court's five members found no such instruction to have been given, J.A. 144 ("the trial judge failed to articulate that the jury must find the killer acted with malicious intent") (Toal J. dissenting), respondents now find the trial judge's instructions on this point to have been "crystal clear." Brief of Respondents at 35. The sole support offered for this contention is the judge's single reference, at the very end of the instructions on express and implied malice, to the jury's duty "to make a determination as to whether malice existed in the heart and mind of the killer at the time the fatal blow was struck." J.A. 96-97.

Petitioner has already listed the many other portions of the charge and of the prosecutor's closing argument which clearly suggested that the question before the jury was whether *Yates* entertained malice. Brief of Petitioner at 24-27. Respondents have failed to reply to any of these points, and have offered no valid reason for concluding that the jury was guided by the single half-sentence cited (out of context) in respondents' brief, rather than by the rest of the record. Accordingly, little further discussion of this aspect of the case is called for here. Petitioner would note only that the portion of the trial judge's charge now relied upon so heavily by respondents actually undermines respondents' argument that the circumstances *preceding* the killing of Mrs. Wood – petitioner's and Davis' plan to commit an armed robbery, their brandishing of weapons, Davis' order to shoot at Willie Wood, and petitioner's firing of two shots – can be taken as conclusive proof of malice in connection with the homicide. To the extent that this fragment of the court's instructions

focused the jury's attention of Davis' intent, the question which it placed before the jury was whether malice was entertained "at the time the fatal blow was struck," not before. *Accord, State v. Norris*, 285 S.C. 86, 91, 328 S.E.2d 339, 342 (1985).

C. The burden-shifting instructions could have affected the jury's assessment of either or both of Yates' defensive claims – that he did not intend to commit a crime likely to result in death, and that he had withdrawn prior to the killing.

In addition to their new theories concerning why the unconstitutional instructions could not have affected the jury's determination of Davis' malice, respondents also assert that the instructions could not have prejudiced Yates even if the jury understood its task to be to determine whether *he* acted with malice. To make this argument, respondents assert in effect that both of Yates' defenses to the state's accomplice liability prosecution – that he did not intend any crime likely to result in death, and that he had withdrawn – were unavailable as a matter of law.

First, respondents argue that "the Petitioner's intent regarding the possibility of a homicide [resulting from the planned robbery] is irrelevant" to the assessment of petitioner's vicarious liability for Mrs. Wood's death. Brief of Respondents at 44. Respondents are able to make this assertion only be ignoring the leading South Carolina case on point. In *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985), the South Carolina Supreme Court reversed a capital murder conviction on the basis of accomplice liability instructions which failed to require the jury to

determine whether a homicide was "a natural and probable consequence of the acts *actually agreed upon* by the [defendants]." 287 S.C. at 247, 335 S.E.2d at 801-802 (emphasis added). While *Peterson* does not, of course, require an express intent to kill on the part of an accomplice, it can only be read as requiring that the state prove the defendant's intent to commit a crime likely to result in death in order to justify conviction of murder on an accomplice liability theory.[3] *Peterson* leaves no doubt that a defendant's intent to commit a crime likely to result in death is an element of accomplice liability for murder under South Carolina law. Although respondents' brief nowhere acknowledges petitioner's testimony at trial by which he vigorously contested the existence of this element, the record plainly shows that petitioner's primary defense to the murder charge was his insistent claim that the robbery plan specifically excluded the actual use of violence. And because the jury could reasonably have understood the malice instructions to shift the burden of

[3] The one South Carolina accomplice liability murder case which respondents do cite, *Thrift v. State*, ___ S.C. ___, 397 S.E.2d 523 (1990), actually reaffirms *Peterson*. Far from removing any requirement of intent, *Thrift* simply held that the instructions given in that case sufficiently apprised the jury of the requirement that the homicide be "a probable and natural consequence of the acts done in pursuance of *the common design*." *Id.*, 397 S.E.2d at 526 (emphasis added). In *Thrift*, moreover, the defendant had failed to create a genuine issue concerning the likelihood of death from the common design, since he acknowledged on the witness stand that he anticipated "that the victim would at least be roughed up" by him and his accomplice, both of whom were armed. *Id.* 397 S.E.2d at 525.

persuasion on this aspect of petitioner's intent, the instructions' prejudicial potential is clear.

Respondents' dismissal of petitioner's claim of withdrawal is likewise unfounded in state law. While counsel for respondents find petitioner's claim of withdrawal to be "perhaps the most ludicrous of Petitioner's claims," they cite no authority whatever in support of their characterization. By contrast, the South Carolina Supreme Court has never intimated in three written opinions in this case that petitioner's testimony was insufficient as a matter of law to make out a defense of withdrawal with respect to the murder charge. Petitioner's research has revealed no South Carolina case clarifying the precise extent to which a conspirator must abandon the criminal enterprise in order to be absolved of liability for a subsequent homicide. But given the failure of the South Carolina Supreme Court to adopt respondents' view of the legal adequacy of Petitioner's claim of withdrawal here, there is no reason to assume that this claim was untenable under state law, or that the burden-shifting malice instructions could not have "eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial." *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530, 535 (1989); J.A. 165 (Toal, J., dissenting).

D. This case provides no occasion to announce a radical curtailment of the Sixth Amendment right to trial by jury in criminal cases.

Before concluding, a word should be said about the request of the amicus curiae state of California for a sweeping overruling of this Court's long-settled rule that

an appellate court may not direct a verdict of guilty as to an element of a criminal offense. *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). California's proposal is not susceptible of principled limitation: if the Sixth Amendment right of jury trial extends only to "any issue that [is] contested or contestable," Brief for the State of California at 14, then no constitutional issue would be presented by a trial judge's peremptory direction of a verdict in favor of the prosecution as to each element found to be "uncontested" or overwhelmingly established. Indeed, where the judge discerned *no* contested elements at the close of the evidence, California would apparently read the Sixth Amendment as authorizing him to take the case from the jury and enter a verdict of conviction by direction of the Court.[4]

For now, however, it need only be observed that the Court need not pass upon the merits of California's proposal to decide this case. Unburdened by any reference to the facts and issues presented by this petitioner's case, California's brief considers only whether certain errors should require reversal even if they could not have affected the outcome. For the reasons set forth in petitioner's opening brief, the burden-shifting jury instructions given in this case could well have affected the jury's verdict on the charge of murder, and reversal is therefore

[4] It is difficult to see, moreover, why California's argument is presented as one involving harmless-error doctrine. For if the Sixth Amendment entitles a criminal defendant to a jury's resolution of "contested" issues only, the removal of "uncontested" issues by directed verdict for the prosecution would not be constitutional error at all, "harmless" or otherwise.

required under even the most permissive mode of harmless-error review.

CONCLUSION

For the reasons set for above and in petitioner's opening brief, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DALE ROBERTS YATES, *Petitioner,*

v.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the burden-shifting instructions given at petitioner's trial constituted harmless error under *Rose v. Clark*.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990
No. 89-7691

DALE ROBERTS YATES, *Petitioner,*

v.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

INTEREST OF THE STATE OF CALIFORNIA

We ask the Court to clarify the harmless error test of *Rose v. Clark*, 478 U.S. 570 (1986), as it may apply

(1) to judgments resting on alternative theories of guilt, where one theory involved an unconstitutional burden-shifting presumption, Pet. Brief on the Merits 19, 29-30, and

(2) to judgments in which the jury was not required to find a necessary element and made no equivalent finding, but overwhelming evidence arguably removes any reasonable possibility that a correctly instructed jury would have rendered a verdict more favorable to the defendant. Pet. Brief on the Merits 16, 19, 31-32.

The resolution of these questions will affect California judgments resting on such alternative theories of guilt as malice murder and felony murder and aiding and abetting,

or involving omission of instructions or misinstruction upon elements of a crime.

SUMMARY OF ARGUMENT

Uncertainty exists concerning harmless error's application to jury trial rights because the Court has not yet come to grips with the problem of how a judicial finding of harmless error can be reconciled with the defendant's right to a *nonjudicial* decisionmaker. The fear is that for a judge to dismiss as harmless an abridgment of a defendant's right to a nonjudicial decisionmaker is to do little more than compound the error, for the effect may be that "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. at 578. This concern is particularly acute when the jury may not have made an essential finding, or when the verdict rests on alternative theories of guilt, one of which is untenable. *See, e.g., Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316, 328-29, 110 S.Ct. 1190 (1990) (Rehnquist, C.J., for the Court); *Carella v. California*, 491 U.S. __, 105 L.Ed.2d 218, 109 S.Ct. 2419 (1989) (Scalia, J., conc.); *Pope v. Illinois*, 481 U.S. 497 (1987) (Stevens, J., diss.).

To resolve this, we will look to the constitutional interests at stake to determine whether application of harmless error invades or protects those interests.

Our thesis is that where it is clear—from evidence, jury findings, concessions, or other circumstances—that no jury could rationally find in the defendant's favor, no legitimate interest of the defendant in a jury trial is abridged by affirmance.

> [A] court should presume . . . that the . . . jury act[s] according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. *A defendant has no entitlement to the luck of a lawless decisionmaker*. . . .

Strickland v. Washington, 466 U.S. 668, 694-95 (1984) (emphasis added).

This test is one that judges traditionally employ in deciding whether issues may go to a jury for decision. When there is no rational basis on which the jury could find in accordance with the instruction in issue, an instruction committing that issue to the jury for decision is unwarranted. *E.g., Hopper v. Evans*, 456 U.S. 605, 611-612 (1982); *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984). "This standard protects the right of the defendant to have the jury weigh the evidence and the credibility of witnesses when the evidence raises a factual dispute and, at the same time, protects against improper verdicts." *Id.*

We do not suggest that courts should not or need not present all essential fact questions to the jury for decision. *See generally In re Winship*, 397 U.S. 358, 363-64 (1970); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *Carpenters v. United States*, 330 U.S. 395 (1947). We do suggest that the "reasonable possibility" test of *Chapman v. California*, 386 U.S. 18 (1965), "protects the right of the defendant to have the jury weigh the evidence and the credibility of witnesses" whenever there is any rational possibility that the jury could find in his favor.

Chapman effectively protects a defendant's right to trial by jury, for it commands reversal whenever there is any reasonable possibility of benefit, and he is entitled to no more.

ARGUMENT

A. THE LAW OF HARMLESS ERROR SHOULD BE SETTLED RESPECTING ABRIDGMENT OF JURY TRIAL RIGHTS.

In *Rose v. Clark*, 478 U.S. 570, this Court emphatically reaffirmed that harmless error analysis is an ally, not an enemy, of constitutional rights.

> Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term: "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than upon the virtually inevitable presence of immaterial error. . . . 'Reversal for error, regardless of the effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'"

478 U.S. at 577, *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Yet some errors, the Court recognized, "necessarily render a trial fundamentally unfair" and require reversal without regard to evidence of guilt. *Id.* "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 810 (1987). Denial of counsel, reliance upon a coerced confession, adjudication by a biased judge, and racial discrimination which "undermines the structural integrity of the criminal tribunal

itself," have all been found fundamental in this sense. *Rose v. Clark*, 478 U.S. at 578; *Vasquez v. Hillery* 474 U.S. 254, 263-64 (1986). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. at 577-78 (citation omitted).

When a defendant's right to a jury is "altogether denied," as where a court directs a verdict, the error cannot be deemed harmless simply because the evidence establishes guilt: "the error in such a case is that the wrong entity judged the defendant guilty." *Id.* at 578; *accord, id.* at 580 n.8; *see Carella v. California*, 105 L.Ed.2d at 223 (jury right is a "structural guarantee . . . that reflects a fundamental . . . reluctance to entrust plenary powers over . . . life and liberty . . . to . . . judges") (Scalia, J., conc.).

When the right to jury trial is *not* "altogether denied," however, harmless error findings may be appropriate. *Rose v. Clark* made clear that *conflicting* instructions, one of which leaves open a reasonable possibility that the jury did not find a fact necessary to guilt, do not amount to a denial of jury trial "altogether." It upheld application of *Chapman v. California* in that circumstance, reasoning that a court need not reverse simply because an error, "*in theory*, may have altered . . . the terms under which the jury considered the defendant's guilt or innocence, and therefore . . . theoretically impair[ed] the defendant's interest in having a jury decide his case." 478 U.S. at 582 n.11 (emphasis added). Many errors have that effect, yet have been held harmless when "*in practice* [they] clearly had no effect upon the outcome." *Id.* (emphasis added).

Ultimately, the Court looked to the practical effect of the error upon the defendant, and not to the procedural mechanism by which the error occurred.

Where no rational jury would have needed to rely on an erroneous instruction, it would be "'an extraordinary perversion of justice'" to reverse without demonstration of prejudice. The error, in such circumstances, is "superfluous." *Id.* at 581 & n.10.

Yet *Rose v. Clark* ambiguously rested its application of harmless error on the form of error—a mandatory rebuttable presumption that "'does not remove the issue . . . from the jury.'" *Id.* at 580 & n.8. This distinction, though useful in that case, left lower courts without reliable guidance for other forms of jury trial error. In particular, *Rose* left open the question of whether *Chapman* can apply where an element or other critical fact is completely omitted from instructions, rather than submitted under conflicting instructions.

This question appeared to have been resolved in *Pope v. Illinois*, 481 U.S. 498, for it is certain that the *Pope* jury did not find an element necessary to conviction. A key element was incorrectly defined; the necessary issue was never put to the jury; the instructions were not conflicting (one correct, one incorrect), but explicitly incorrect. The jury was instructed that "serious literary, artistic, political or scientific value" should be determined by reference to ordinary Illinois adults, rather than to a more generic "reasonable person." The Court found this distinction sufficiently weighty to constitute constitutional error, but nonetheless upheld harmless error analysis, stating:

> To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, e.g., *Cabaña v. Bullock*, 474 U.S. 376, 384 (1986), after *Rose*, they are no longer good authority.

Pope v. Illinois, 481 U.S. at 504 n.7. Relying on *Rose* or *Pope*, numerous state and federal decisions have applied *Chapman* to instructional errors that removed or omitted elements or directed findings concerning elements.[1]

However, *Pope* also had in it language asserting that it was *not* a "complete omission" case, but more akin to a "conflicting instructions" case:

> The situation here is comparable to that in *Rose v. Clark* . . . . The error in *Rose* did not entirely preclude the jury from considering the element of malice . . . . [¶] Similarly, in the present cases the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value.

Pope v. Illinois, 481 U.S. at 502-03 (citations omitted).

Evidently, it was enough to justify harmless error analysis that the jury was told that it must find value, even though, so to speak, it was instructed to measure value in pounds rather than dollars. The jury issue was not "altogether" removed: there remained a convertible substitute—convertible by judges without unduly infringing upon the defendant's right to jury trial.

Recently, writing for four justices, Justice Scalia amplified this ambiguous explanation of *Pope* and *Rose*. In *Carella v. California*, 105 L.Ed.2d 218, he noted he had

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1. California cases finding omission of elements to be harmless error include, for example, *People* v. *Joiner*, 204 Cal.App.3d 221, 251 Cal.Rptr. 63 (1988) (penetration, rape); *People* v. *Gary*, 189 Cal.App.3d 1212, 1217, 235 Cal.Rptr. 30 (1987) (act forbidden by law, DUI); *People* v. *Lopez*, 188 Cal.App.3d 592, 600-02, 233 Cal.Rptr. 207 (1986) (knowledge, resisting arrest). But see *People* v. *Lawson*, 189 Cal.App.3d 741, 751-54, 234 Cal.Rptr. 557 (1987); *People* v. *McElrath*, 175 Cal.App.3d 178, 185, 220 Cal.Rptr. 698 (1985).

joined the *Pope* majority "only because I believed that *no rational juror could plausibly have found* the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Id.* at 225 (emphasis altered). This part of his explanation, a standard application of *Chapman*, looked to practical effect.

However, he made clear, the essential prerequisite to such a *Chapman* analysis is a "closely related" jury finding.

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so *closely related* to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is *functionally equivalent* to finding the element required to be presumed. The error is harmless because it is "beyond reasonable doubt," Chapman v. California, *supra*, 386 U.S. 18, 24 (1967), that *the jury found* the facts necessary to support the conviction.

Id. at 225-26 (emphasis added).

In short, the sine qua non of this analysis is a "closely related" or "functionally equivalent" jury finding.[2] Under this construction of *Rose* and *Pope*, for error affecting the defendant's right to a nonjudicial factfinder to be harmless, *a jury* must have passed upon the required issue, or come sufficiently close in its other findings, that, considering the weight of the evidence, no reasonable possibility of a different *jury* finding can be found to exist.

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2. *Cf. People* v. *Sedeno*, 10 Cal.3d 703, 721, 518 P.2d 913, 112 Cal.Rptr. 1 (1974) (omission of lesser included offense instruction is harmless where jury necessarily resolved factual question adversely to defendant under other, proper instructions), *overruled on other grounds*, *People* v. *Flannel*, 25 Cal.3d 668, 603 P.2d 1, 160 Cal.Rptr. 84 (1979).

Indeed, it must have come so close that one can conclude the defendant's jury—not the "average jury" specified for *Chapman* analysis[3]—"found" the necessary facts.

One might ask why we need *Chapman* or *Rose v. Clark*. Where is the error if the jury "found" the necessary fact? It is precisely because a reasonable prospect exists that the jury did *not* find the necessary fact that constitutional error exists. *See Boyde v. California*, 108 L.Ed.2d at 329 ("reasonable likelihood"); *Sandstrom v. Montana*, 442 U.S. 510, 519, 524 (1979) ("reasonable possibility"). *Chapman* analysis thus begins with a "reasonable likelihood" that the jury did not find a necessary fact. To posit that the analysis can succeed only if one finds it patent that "the jury found" the missing fact is conceptually unclear at the least, if not necessarily circular.

One explanation could stem from the fact that *Sandstrom* measures the potential constitutional impact of presumption error by looking only to the words of the instruction without regard to the evidence or other findings; constitutional error exists if prejudice, in this isolated perspective, is reasonably likely, rather than actual. *Boyde v. California*, 108 L.Ed.2d at 329; *Francis v. Franklin*, 471 U.S. 307, 315 (1985). *Chapman* thus can serve to place the potential constitutional error into the context of the evidence, and, at least where "functionally related" findings exist, to establish that the constitutional prejudice latent in the defective instruction did not in fact occur.[4]

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3. *E.g.*, *Pope* v. *Illinois*, 481 U.S. at 503 n.6; *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

4. *But see Rose* v. *Clark*, 478 U.S. at 582 n.11 ("Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the

But what rule should apply when constitutional error unmistakably *did* occur, as where the instructions completely omit a necessary element and no equivalent finding exists?

The *Carella* minority would apparently hold this automatic reversible error, for it is plainly not enough to the minority that a reviewing court might believe the evidence leaves no reasonable possibility of a finding favorable to the defendant, for that would measure the prejudice in terms of the reliability of the guilt finding, not in terms of the defendant's interest in a nonjudicial decisionmaker:

> "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been *found by a jury* according to the procedure and standards appropriate for criminal trials." Bollenbach v. United States, 326 U.S. 607, 614 (1946). "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." Cabana v. Bullock, 474 U.S. 376, 384-385 (1986).

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outcome?); *Pope* v. *Illinois*, 481 U.S. at 503 n.6 ("We do not understand *Rose*, as the dissent apparently does, to be based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice. To say that the jury 'would have found it unnecessary to rely on the presumption,' or that the impermissible instruction was 'superfluous,' is not to say that the reviewing court can retrace the jury's deliberative processes but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.") (citation omitted).

Carella v. California, 105 L.Ed.2d at 224 (Scalia, J., conc.) (emphasis added).

> [I]t would not matter, for purposes of assuring Carella his jury-trial right, whether the record contained overwhelming evidence that he in fact embezzled the car. For nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judges the defendant guilty." Rose v. Clark, supra, at 578.

Carella, 105 L.Ed.2d at 224 (Scalia, J., conc.) (emphasis in original).

Justice Scalia was joined by three justices, and Justice Stevens stated similar views in *Pope*. 481 U.S. at 509-10 ("The harmless-error doctrine may enable a court . . . to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings.").

The *Carella* Court did not endorse either interpretation of *Pope* and *Rose*. The per curiam opinion simply quoted from *Rose v. Clark*:

> "When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. In many cases, the predicate facts conclusively establish intent, so that *no rational jury could find* that the defendant committed the relevant criminal act but did not intend to cause injury. . . . In that event the erroneous instruction is simply superfluous: *the jury has found*, in Winship's words, 'every fact necessary'

to establish every element of the offense beyond a reasonable doubt."

Id. at 222, *quoting Rose v. Clark*, 478 U.S. at 580-81 (emphasis added).

In short, *Rose*, *Pope* and *Carella* leave uncertainty. What appeared to have been decided in *Rose* and *Pope* remains just as disputed as it was when *Connecticut v. Johnson*, 460 U.S. 73 (1983), *Koehler v. Engle*, 466 U.S. 1 (1984), and *Francis v. Franklin*, 471 U.S. 307, were before the Court. We suggest that relief may be found in resort to first principles.

B. The Defendant's Interest in Trial by Jury Is Not a Right to an Irrational Verdict: His Ultimate Legitimate Interest Is in Justice According to Law and Reason.

The right to trial by jury protects defendants from judicial decisionmaking in essential matters. It is a "structural guarantee . . . that reflects a fundamental . . . reluctance to entrust plenary powers over . . . life and liberty . . . to . . . judges." *Carella v. California*, 105 L.Ed.2d at 223 (Scalia, J., conc.).

A jury reflects the community, and its sense of justice, in a way that the judiciary cannot and is not intended to reflect. The right to jury trial not only ensures enlightened and reliable factfinding through the common sense and experience pooled in the jury, but also ensures that the *law* is interpreted and applied in light of community values, an interest once recognized expressly, *e.g.*, *Brady v. Maryland*, 373 U.S. 83, 89 (1963); *United States v. Wilson*, 28 Fed. Cases 699, 708 (Cir. Ct. E.D. Pa. 1830) (No. 16,730), and still acknowledged sub silentio in the doctrines of jury nullification and the "reasonable man." *See, e.g., People v. Dillon*, 34 Cal.3d 441, 490, 668 P.2d 697, 194 Cal.Rptr. 390 (1983) (Kaus, J., conc.); *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 223, 157 P.2d 372 (1945) (Traynor, J., for the Court); *Toschi v. Christian*, 24 Cal.2d 354, 365, 149 P.2d 848 (1944) (Traynor, J., diss.).

We take it as given, therefore, that findings by a jury are inherently of a different quality than findings by a judge. "[M]any things are revealed to the humble that are hidden from the great."[5] The jury, as "'conscience of the community,'" applies values that may not be shared by a judge. Its "common" sense and experience may be superior to or at least different from that of a judge. As "peers" of the defendant, jurors also may possess special insight and understanding. Findings by a judge simply are not of the same kind, whatever the evidence. This difference has meaning not only to the jury's factfinding, but also to its application of law to facts.

The function of the jury encompasses more than assurance of reliable verdicts. It elevates the quality of justice by making the community its measure. Moreover, what may seem reliable to a judge can be different from what seems reliable to a jury. That is part of the reason why jury trial is a right.

In short, judicial interference with the right to trial by jury is seldom immaterial. When there is discretion to be exercised, whether that discretion involves credibility,[6]

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5. A. Stevenson, The Wit and Wisdom of Adlai Stevenson (E. Hanna, H. Hicks & T. Koppel, eds., 1965).

6. Credibility assessments are the jury's exclusive function, and a reviewing court may not intrude far into credibility assessment without denying the right to jury. *See Delaware* v. *Van Arsdall*, 475 U.S. at 680 (confrontation denial is not measured by impact on the reliability of the outcome, but on whether, in light of the barred cross-examination, "[a] reasonable *jury* might have received a significantly different impression of . . . credibility") (emphasis added).

evidence or law within the jury's purview, the jury must exercise the discretion.

Nonetheless, *Rose v. Clark* correctly looks to the practical significance of error, not to mere theoretical effect. *Rose v. Clark*, 478 U.S. at 582 n.11. There *are* cases in which the issue to which the error relates was nominal rather than real. A harmless error finding does no damage to a defendant's interest in a jury factfinder if the error did not concern any issue that was contested or contestable, but only an issue that could not rationally have been decided by a jury advantageously to the defendant. One may justly hold the right to trial by jury is not denied, or the denial is harmless, when the defendant's interest is not abridged in any realistic sense.

Any other view does damage to public respect for the law. *id.* at 577; *Delaware v. Van Arsdall*, 475 U.S. at 681. To justify a rule of reversal per se despite the absence of any practical impact upon the defendant, one must take the view either (1) that the right at stake is so important, the risk of prejudice so likely or elusive, that

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But *Chapman* still was applied in *Van Arsdall* to error that by definition affected credibility. *Id.* at 680-84; *see also Rose* v. *Clark*, 478 U.S. at 582 n.11 (many errors "alter the terms under which the jury considered the defendant's guilt, and therefore . . . theoretically impair the defendant's interest in having a jury decide his case," yet *Chapman* applies).

"The correct [*Chapman*] inquiry," the Court held in *Van Arsdall* with respect to a denial of cross-examination which might have exposed witness bias,

> is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends on a host of factors . . . .

475 U.S. at 684. The same method of analysis may apply to other credibility issues pertinent to harmless error assessment.

the cost of reversing some cases for essentially irrational reasons must be accepted in order to protect the right in other cases, *e.g., United States v. Cronic*, 466 U.S. 648, 659 & n.25, or (2) that the right of a defendant to jury trial includes a right to the chance of an irrational verdict, i.e., to jury nullification.

When there is not even a reasonable possibility that a jury would have ruled favorably to the defendant but for the error or omission, a defendant's claim for reversal must necessarily rest on an implicit assertion of a right to an irrational verdict. We do not deny the jury's power to acquit in the teeth of the facts and law, but we do deny any constitutional *right* to such an acquittal. The people, through their juries, can justly be viewed as a final democratic check upon the perceived excesses of government through "nullification," compromise, or other ad hoc adjustment of the law to the perceived requirements of justice.[7] The existence of such a power *in the community* entails no necessary acknowledgement of a right *in the defendant* to the exercise of that power.

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7. The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of the law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.

United States ex rel. McCann v. *Adams*, 126 F.2d 774, 775-76 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942).

He is guaranteed justice according to law, not more. "Nullification" and other ameliorations of criminal charges are public powers, exercised by the public on behalf of the public alone, though the defendant will benefit.

Hence, the Court taught in *Strickland*,

> [A] court should presume . . . that the . . . jury act[s] according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, caprice, "nullification," and the like. *A defendant has no right to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.* The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend upon the idiosyncracies of the particular decisionmaker . . . .

466 U.S. at 694-95 (emphasis added).

C. Neither a Jury's Failure to Find an Essential Element, Nor the Absence of "Functionally Equivalent" Findings, Should Compel Automatic Reversal.

Since the Court already has declined to recognize a right to an irrational verdict, what is left is to consider whether a rule of reversal per se, or, as a middle ground, a rule that "predicate" or "functionally equivalent" findings must exist, is so necessary to protection of the defendant's right to trial by jury that the cost of reversing some cases pointlessly must be accepted.

Chapman is a sharp and effective tool. It protects the defendant whenever there exists any rational possibility

that a correctly instructed jury would find in his favor. It preserves to him the benefit of every reasonable possibility of advantage.

The *Chapman* test, after all, was formulated with a view to controlling courts perhaps hostile to constitutional rights, and to limiting "unfair and mischievous results." *Cf. Chapman v. California*, 386 U.S. at 21-22, 50; Traynor, The Riddle of Harmless Error 43 (1970). It generally has proved an adequate safeguard against even wilful insensitivity.

No test of prejudice or rule of reversal is perfect; each involves costs. A lower court will sometimes exercise its judgment differently from how this Court might exercise its judgment, particularly if the manner of applying the test of prejudice is unclear, as in this case. "[M]alleability" and "inconsistent . . . results" may sometimes seem a "plague" and a "confusion," see *Francis v. Franklin*, 471 U.S. at 322-23 n.8, but that judgment may vary does not impeach the propriety of its exercise. The consistency demanded by the Constitution is not that of regular reversal or affirmance, but of respect for basic constitutional principles. Just as we assume juries ordinarily will respect the instructions of judges, so we must also assume that judges will respect the instruction of the Constitution. It cannot be generally supposed that the judges of inferior courts hold constitutional values in any less esteem than the members of this Court. Were the manner of its application to this kind of error clarified, the *Chapman* test would be a strong and sufficient protection of the right to trial by jury.

There is a danger in the use of "mechanical formulas that tend to replace discriminating judgment" quite as severe as the danger that harmless error rules might swallow up constitutional rights. "A rational test . . . must operate to preserve such rights even as it serves to screen

out innocuous errors." Traynor, The Riddle of Harmless Error 19-20 (1970).

If reversal is neither necessary nor wise in every case, should there not be required at least some "predicate" finding or "functionally equivalent" finding from which a court can conclude that, though the jury may not have passed upon the essential issue necessary to conviction, it at least considered some fact question closely related to the omitted fact and found against the defendant?

When no rational jury could possibly find in the defendant's favor, reversal for lack of "predicate" or "functionally equivalent" findings serves only to offer the defendant a chance of an irrational verdict. While "closely related" findings offer solace to courts sensitive to denial of jury rights, and some assurance against prejudice, other reliable means of guarding against prejudice are available, including weighing the evidence. It makes no sense to restrict the *Chapman* test's applicability to the single circumstance of "closely related" findings. It is an essentially arbitrary limit upon the exercise of discriminating judgment.

It is certain the *Pope* jury did not find that a reasonable person would find serious literary, artistic, political, or scientific value in the allegedly obscene material, for it was never instructed that it must so find. Indeed, it was instructed to find something else: the value an ordinary Illinois adult would place on the material. Although the difference between what it actually found and what the defendant had a right to have it find may have been subtle, it was judged significant, for the Court found constitutional error. There is no escaping the fact that the jury did not find an essential element.

Justice Scalia joined that opinion because he believed "that no rational juror could plausibly have found the magazines utterly lacking in value under a community

standard and come to a different conclusion under a reasonable person standard." *Carella v. California*, 109 S.Ct. at 2423. His test looked both to the weight of the evidence as *Chapman* does and to the existence of "functionally equivalent" jury findings:

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed. The error is harmless because it is "beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967), that *the jury found the facts necessary to support the conviction.*

Id. (emphasis added).

With respect, this conclusion should be reconsidered. The jury did *not* find the "facts necessary to support the conviction." It found a highly similar fact. A court might well be able to conclude in light of that finding and the weight of the evidence that no rational jury could fail to find the missing fact, were it correctly instructed, but it still is a court that supplies that finding, not the jury.

The "functionally equivalent" test appears to be a special case of *Chapman* analysis that ultimately depends not upon the actual existence of a jury finding of a necessary element, but upon an analysis of "reasonable possibilities" in light of the evidence and the totality of circumstances, including the existence of a closely related finding. Other equally reliable special cases of *Chapman* analysis independent of "functionally equivalent" findings certainly exist. The plurality in *Connecticut v. Johnson*, 460 U.S. at 87, accepted acquittal or concession of intent as circumstances also justifying findings of harmless

error,[8] and other courts have relied on other factors. "Whether such an error is harmless in a particular case depends upon a host of factors . . . ." *Delaware v. Van Arsdall*, 475 U.S. at 684.

If the evidence in *Pope*, taken in conjunction with such other circumstances, could justify a finding of harmless error despite the failure of the jury to find the necessary element, why may not evidence alone justify finding harmless error when the evidence leaves no reasonable doubt that a correctly instructed jury would find all necessary facts? "[T]here may be cases," for example, "where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and in which the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration." *People v. Garcia*, 36 Cal.3d 539, 556, 684 P.2d 826, 205 Cal.Rptr. 265 (1984).[9]

In either case, the determinative question is whether "'on the whole record'" there is a reasonable possibility that a correctly instructed jury would find for the defendant. *Rose v. Clark*, 478 U.S. at 583. In either case, the defendant obtains the benefit of every rational possibility. In neither case, does he have a right to more.

If requiring "predicate" findings or "functionally equivalent" findings does not benefit any legitimate interest of the defendant, who does benefit?

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8. *But see Rose* v. *Clark*, 478 U.S. at 583 (harmless error does not turn on whether defendant conceded the issue, but on consideration of the entire record).

9. "Evidence not worthy of consideration" is evidence that is not "substantial," i.e., evidence that would not support a rational finding, viz., of reasonable doubt. *See People* v. *Wickersham*, 32 Cal.3d 307, 325, 650 P.2d 311, 185 Cal.Rptr. 436 (1982); *People* v. *Flannel*, 25 Cal.3d 668, 684-85, 603 P.2d 1, 160 Cal.Rptr. 84 (1979).

Such a requirement *could* serve as a blurry line dividing what are perhaps more limited abridgments of jury trial rights from perhaps more sizable abridgments of jury trial rights. We say "blurry" because "predicate," "closely related" and "functionally equivalent" are not self-defining terms. Obviously, a "functionally equivalent" finding is not the same finding as the missing finding. The gap between them seemingly is bridged with evidence: otherwise, one takes issue with *Rose v. Clark* itself. See *Rose v. Clark*, 478 U.S. at 579, 583 ("Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed"). A finding would seem to be "functionally equivalent" to a missing finding when, given the evidence and other circumstances, no rational juror could plausibly find the fact found and come to a different conclusion as to the missing fact. *See Carella v. California*, 105 L.Ed.2d at 225-26 (Scalia, J., conc.) How far can a "closely related" finding differ from the missing fact finding? Evidently, as far as the evidence will stretch.

Moreover, the apparent premise of the *Carella* concurrence—that a mandatory presumption instruction upon a contested element is susceptible of harmless error review because it is less prejudicial than an omission of instructions concerning an uncontested element—is exceedingly doubtful. *See id.* at 226-27 ("jury's failure to make any factual determination of the elemental fact" is quite different). And to what purpose, when in neither case has the right to jury trial been "altogether denied"?

"Predicate" and "functionally equivalent" findings *do not* serve to insure that "'guilt has been found by a jury according to the procedure and standards appropriate for criminal trials,'" *id.* at 224, *quoting Bollenbach v. United States*, 326 U.S. 607, 614 (1946), for by definition the jury has not been required to find all essential facts "'according

to the procedure and standards appropriate for criminal trials.'" The *Bollenbach* rule is a rule of reversal per se, and is not a means of applying or ordering a rule of harmless error.

When a jury has been provided to a defendant but error affecting necessary jury findings nonetheless has occurred, and when on review it is clear beyond doubt—from evidence, jury findings, concessions, or whatever source—that no jury could rationally find in the defendant's favor, then no legitimate interest of the defendant in a jury trial is abridged by affirmance and no public interest is served by a pointless reversal.

Courts applying a harmless error test to jury issues must be sensitive to the unique abilities and responsibilities of a jury, and to any potential difference that might exist between a jury's values and view of what is just and rational and the court's. It is not simply the reliability of the verdict as it appears to a judge that is the test; it is, rather, a question of the reliability and justice of the verdict as it might appear to a jury. To affirm, it must be "clear beyond a reasonable doubt that if the jury had [been instructed correctly] *its* verdict would have been the same." *Pope v. Illinois*, 481 U.S. at 503 n.6 (emphasis added). Where confidence in the integrity of the *jury's* verdict is undermined, the judgment should be reversed.

The sensitivity this analysis requires does not place it beyond judicial competence, for *Chapman* in this review context expresses a familiar standard that trial judges employ daily in deciding whether issues must go to a jury for decision. When there is no rational basis on which the jury could find in accordance with an instruction in issue, committing the issue to the jury is unwarranted. *E.g., Hopper v. Evans*, 456 U.S. at 611-612 (1982); *United States v. Jackson*, 726 F.2d at 1468. "This standard protects the right of the defendant to have the jury weigh

the evidence and the credibility of witnesses when the evidence raises a factual dispute and, at the same time, protects against improper verdicts." *Id.*

We do not overlook the danger that intrusion into the jury function can leave the right to jury trial a shell without substance. It is plain there is a point past which courts cannot go in overlooking error without undermining the dignity of the right and eroding faith in the structural integrity of the criminal process. But *Chapman*, we believe, is a better guarantee that the real substance of the jury right will be afforded defendants than any arbitrary scheme limiting *Chapman* to particular avenues of error.

In short, whether the case involves mandatory presumptions (*Rose*), conclusive presumptions (*Carella*), misdescription of elements (*Pope*), or omission of elements (*Yates*, see Pet. Brief on the Merits 16, 19, 31-32), i.e., even in cases where the jury has not necessarily made "functionally equivalent" findings, *Chapman* gives the defendant the benefit of every reasonable possibility of a favorable finding, and he is entitled to no more.

D. The Existence of Alternative Theories Should Not Compel Automatic Reversal.

Petitioner maintains that the instructions given by the trial court permitted the jury to convict him under alternative theories, one based upon a finding he himself had malice, the other based on imputed liability for the malice of his accomplice. Citing *Bollenbach v. United States*, 326 U.S. at 614, and *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), he concludes the errors are "prejudicial as a matter of law." Pet. Brief on the Merits 19, 29-30.

The *Bollenbach* decision was overruled sub silentio by *Rose v. Clark*, and the somewhat broader principle of *Stromberg* was called into serious question. Both cases predate *Chapman* and are expressions of the general rule of automatic reversal that prevailed before the Court and Congress accepted the legitimacy of harmless error. *See generally Kotteakos v. United States*, 328 U.S. 750, 759-65 (1946).

The debate in *Rose v. Clark* turned on the question of whether these decisions retained validity in presumptions cases. The jury in *Rose*, and in each of the three similar preceding cases in which the Court had deadlocked, had received instructions that permitted it to find malice either from the evidence or by way of an unconstitutional, burden-shifting presumption.

By definition, there was a reasonable possibility that one or more jurors had relied upon the unconstitutional theory; that was what made it constitutional error. *Sandstrom*, 442 U.S. at 514 ("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction"). As there was no way to determine in fact that the jury had not relied upon the presumption, a plurality of the Court had argued reversal was compelled. *See Sandstrom v. Montana*, 442 U.S. at 526 (Brennan, J.) ("'[I]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.'"); *Connecticut v. Johnson*, 460 U.S. at 81-88 (Blackmun, J.); *Francis v. Franklin*, 471 U.S. at 323 n.8 (Brennan, J.).

If *Rose v. Clark* did nothing else, it decided against that argument, holding that the *Chapman* harmless error test—which looks to the weight of the record evidence, and tests it by what a reasonable jury would do, not by what the particular jury in fact may have done—*applies*

even in circumstances where the case was submitted to the jury on alternative theories, one of which is constitutionally inadmissible. That is *Rose v. Clark*'s basic holding.

At a minimum, *Bollenbach* is overruled. *Bollenbach* was a rebuttable presumption case[10] in which the challenged instruction produced a guilty verdict within five minutes from the "'hopelessly deadlocked'" jury. The Court reversed without regard for the evidence of guilt. 326 U.S. at 613-14. *Bollenbach* cannot be the law today; *Chapman* would apply. *Rose v. Clark*.

It was the *Rose v. Clark* dissenters, not the majority, who cited *Bollenbach* and insisted that an appellate court has no choice but to reverse where the jury might have relied upon an erroneous instruction or theory. *Rose v. Clark*, 478 U.S. at 590-96 (Blackmun, J., diss.).

The majority responded that the dissent "'asks and answers the wrong question.'" *Id.* at 582 n.11.

> Harmless-error analysis addresses a different question: what is to be done about a trial error that, *in theory*, may have altered the basis on which the jury decided the case, but *in practice* clearly had no effect upon the outcome?

Id. (emphasis added).

The answer was that harmless error doctrine applies: "'*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.'" *Id.* at 583. The inquiry must

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10. "I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case."

Bollenbach, 326 U.S. at 609.

look to the *evidence*, not hypothetical possibilities, determining whether it was so dispositive that the reviewing court can say the jury would have found it unnecessary to rely upon the erroneous instruction. *Id.* at 583. "[I]t is enough to recognize that in some cases that inference is overpowering. It would further neither justice nor the purposes of the *Sandstrom* rule to reverse a conviction in such a case." *Id.* at 581 (citation and footnotes omitted).

The Court reiterated this holding in *Pope v. Illinois*, 481 U.S. at 502-03, and expressly rejected any application of *Chapman* which would look to what the actual jury did, as distinct from what a reasonable jury would do:

> We do not understand *Rose*, as the dissent apparently does, to be based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice. To say that the jury "would have found it unnecessary to rely on the presumption," or that the impermissible instruction was "superfluous," is not to say that the reviewing court can retrace the jury's deliberative processes but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.

Id. at 503 n.6 (emphasis in original) (citations omitted).

These same principles invalidate *Stromberg v. California*. There are many cases that are put to the jury under alternative theories of guilt which result in a single general verdict. It is a commonplace to prosecute a murder charge, for example, under theories of malice

aforethought, felony murder, and aiding and abetting.[11] Obviously, in many of these cases the evidence supporting one theory will be substantially stronger than evidence supporting another. However, if an element should happen to be incorrectly defined or omitted from the instructions outlining the weakest of the theories, *Stromberg* would mandate reversal despite evidence supporting the other theories so overwhelming that one could reasonably hold the erroneous instruction was "simply superfluous."

The Court recognized in *Rose v. Clark* that "it would defy common sense to conclude that an execution-style killing or violent torture-murder was committed unintentionally." 478 U.S at 581 n.10. In appropriate circumstances, that execution-style killing or torture-murder could well have been charged and tried as both premeditated murder and as felony murder. Should a defect in the felony murder instructions invalidate common sense appraisal of the evidence supporting premeditated murder?

Rose v. Clark involved alternative theories of guilt. The jury could have convicted the defendant either by finding malice or by relying on a presumption of malice. If *Stromberg* remained good law, reversal would have been

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11. Sixth Amendment issues relating to this practice are currently pending before the Court in *Schad* v. *Arizona*, No. 90-5551. California, like many states, has long held that a general charge of murder affords notice of every theory of murder made out by the evidence, and a general verdict of murder supports conviction upon any theory of murder to which the evidence is applicable. California requires unanimity as to the verdict, but not as to the theory. *E.g.*, Cal. Const. art. I, § 16; *People* v. *Thomas*, 43 Cal.3d 818, 829 n.5, 740 P.2d 419, 239 Cal.Rptr. 307 (1987); *People* v. *Guerra*, 40 Cal.3d 377, 386, 708 P.2d 1252, 220 Cal.Rptr. 406 (1985); *People* v. *Watkins*, 195 Cal.App.3d 258, 240 Cal.Rptr. 626 (1987); *People* v. *Williamson*, 90 Cal.App.3d 164, 170, 153 Cal.Rptr. 48 (1979).

compelled, for by definition it was impossible to identify the theory the jury had followed. *Cf. Stromberg v. California*, 283 U.S. at 368. *Rose v. Clark* rejected this result and took the evidence into account, rather than rejecting it as irrelevant.

We do not suggest affirmance is appropriate when a reasonable possibility of a more favorable verdict exists but for the error. We do respectfully maintain that when, after a review of the record pertaining to the constitutionally unimpeached theory of criminal liability, the reviewing court can conclude "beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same," *Chapman* should govern. *See Pope v. Illinois*, 481 U.S. at 503 n.6.

Dated: December 13, 1990.

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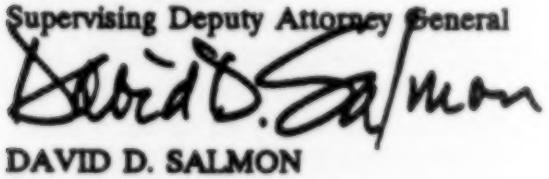

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FILED

DEC [illegible]

JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections,
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

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QUESTIONS PRESENTED

1. When a jury is instructed that (1) malice is presumed from the use of a deadly weapon, but (2) the presumption is removed when the circumstances of the use are put in evidence, is that instruction harmless error when those circumstances are, in fact, put in evidence?

2. In a case where no evidence which could reduce an intentional killing to anything less than murder has been introduced, is an instruction that malice is "implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act" *Sandstrom* error? If so, is it harmless error?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections,
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on a final judgment. The ground of the attack is certain jury instructions on implied malice which (1) were once universally accepted

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1. CJLF has received written consent of the parties to file this brief.

black-letter law and only in recent years have been called into question; (2) were extremely unlikely to have influenced the result in this case; and (3) were not objected to by defense counsel at trial or on direct appeal. Collateral attack on the basis of such marginal claims is contrary to the interests of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

According to Yates' own testimony, he and Henry Davis entered T. P. Wood's store for the purpose of committing armed robbery. Yates was armed with a gun, and Davis was armed with a knife. The robbers pulled their weapons, and Yates demanded the money in the cash register. Willie Wood handed over the money without resistance. Davis ordered Wood to place himself in a defenseless position by leaning over the counter. Wood then made a movement which Yates interpreted as going for a gun. Davis ordered Yates to shoot Wood. Yates aimed his gun at Wood and fired twice. Yates left the store with the money and waited in the car for Davis until he concluded that Davis had been captured. Then he drove away. J. A. 52-58.

It is also undisputed that one of the bullets Yates fired passed through Mr. Wood's hand and tore the skin on his chest. Mr. Wood and Davis then fought, and Mrs. Helen Wood came to her son's assistance. Davis killed Mrs. Wood by stabbing her through the heart with his knife. The wound penetrated the full width of the chest. Mr. Wood then shot and killed Davis. J. A. 19-21, 31-32.

The jury instructions included the following instructions on implied malice:

> "Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an [1208]

> unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> "I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." J. A. 96-97.

Yates was convicted of murder and sentenced to death. He was represented by counsel at trial and on appeal. There was no objection to the instruction either at trial or on appeal. Opp. Pet. Cert. 3. The sentence was affirmed. *State* v. *Yates*, 280 S. C. 29, 310 S. E. 2d 805 (1982). This Court denied certiorari. *Yates* v. *South Carolina*, 462 U. S. 1124 (1983).

After the state supreme court denied an original state habeas petition, this Court remanded for reconsideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985). *Yates* v. *Aiken*, 474 U. S. 895 (1985). The state court decided that the deadly weapon instruction was erroneous, but that this rule was not retroactive to Yates' case. *Yates* v. *Aiken*, 290 S. C. 231, 349 S. E. 2d 84 (1986). This Court reversed the nonretroactivity determination, in an opinion which did not discuss any issue but retroactivity, and "remanded for further proceeding not inconsistent with this opinion." *Yates* v. *Aiken*, 484 U. S. 211, 218 (1988).

On remand, the state court decided that the instruction was harmless error. *Yates* v. *Aiken*, 391 S. E. 2d 530 (S.C. 1989).

SUMMARY OF ARGUMENT

Analysis of presumption issues should begin by classifying the presumption. The deadly weapon presumption in this case is a classical Thayer-Wigmore "bursting bubble" presumption. It disappears upon the introduction of other evidence. The jury was instructed to disregard the presumption upon the introduction of evidence such as that actually introduced in this case. The instruction, if error at all, was harmless under any standard.

The question of whether the "intentional doing of an unlawful act" instruction is federal constitutional error at all is properly before the Court. If the act referred to is the intentional killing of the victim, the instruction is not *Sandstrom* error at all, but rather the traditional definition of implied malice. Under the standard established in *Boyde* v. *California*, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), it is not reasonably likely that the jury interpreted the instruction in such a way as to violate *Sandstrom*.

ARGUMENT

I. "Bursting bubble" presumptions are harmless whenever the bubble has been burst.

Before proceeding to determine whether a presumption instruction affected the substantial rights of the defendant, it is essential to first properly classify the presumption. "The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979). The degree of curtailment, in turn, depends on the type of presumption and its relation to the evidence in the case.

A. Types of Presumptions.

The proper effect of presumptions has for many years been the subject of heated debate among some of the foremost scholars in American law. An overview of the debate may be found in Professor Chadbourn's revision of Wigmore, where both Wigmore's original view and the criticisms and alternatives are presented. See 9 J. Wigmore, *Evidence* 283 (Chadbourn rev. 1981) (revisor's note). For a federal court reviewing a state criminal case, however, the question is not which view of presumptions is "right." The questions are merely which type was actually presented to the jury, whether that type violates any constitutional requirement, and if so whether the violation was harmless in the context of the present case.

1. Conclusive presumptions.

Conclusive presumptions are rules of substantive law masquerading as rules of evidence. 9 Wigmore, *supra*, § 2492, at 307-308; J. Thayer, *A Preliminary Treatise on Evidence* 318 (1898). When a state decides that the child of a married woman is "conclusively presumed" to be the child of her husband, for example, the state is actually deciding as a matter of policy that the legal rights and duties of fatherhood should belong to the husband and not to some other man, regardless of biological relation. See *Michael H.* v. *Gerald D.*, 109 S. Ct. 2333, 2340, 105 L. Ed. 2d 91, 103 (1989) (plurality).

In the past, the judiciary sometimes created conclusive presumptions to disguise the fact that they were legislating substantive law. See Thayer, *supra*, at 319. When a legislature with the complete right to legislate substantive law does the same thing, it is simply being inept. The result is a completely unnecessary dispute about form rather then substance.

The California Legislature decreed that a person who willfully and intentionally fails to return a rental car is presumed to have embezzled it. Cal. Veh. Code § 10855. This statute needlessly ran afoul of *Sandstrom*. See *Carella* v. *California*, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989). The state surely has

the power to criminalize willful and intentional failure to return a rental car, and the Legislature could easily have added that act to the multifaceted consolidated theft statute, Cal. Pen. Code § 484. The practical effect would have been precisely the same.

In *Carella* the Court was divided on the proper standard for harmless error in conclusive presumption cases. The majority held that the error would be harmless if "no rational jury could find the predicate acts but fail to find the fact presumed." *Id.*, 109 S. Ct., at 2421, 105 L. Ed. 2d, at 222-223. The concurring opinion contended that harmless error analysis was proper if the predicate facts and presumed element were so closely related that the finding of one was, in reality, the finding of the other. *Id.*, 109 S. Ct., at 2423, 105 L. Ed. 2d, at 225-226 (Scalia, J., concurring in the judgment). However, the concurrence indicated that the other kind of harmless error analysis endorsed in *Rose* v. *Clark*, 478 U. S. 570 (1986), that the overall record establishes guilt beyond a reasonable doubt, should not be used in conclusive presumption cases. 109 S. Ct., at 2424, 105 L. Ed. 2d, at 226-227.

Since this case does not involve conclusive presumptions, this issue need not be resolved here. It is worth noting, however, that an error meeting the concurrence's standard would be harmless error in *any* presumption case, because the conclusive presumption calls for the strictest test.

2. Permissive inferences.

At the opposite end of the scale "is the entirely permissive inference or presumption, which allows — but does not require — the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." *Ulster County Court, supra*, 442 U. S., at 157. This kind of "permissive presumption" implicates federal rights only if the presumption itself is logically invalid.

There are many examples in the case law of valid and invalid permissive presumptions. A presumption that the possessor of heroin knows it to be illegally imported is valid, because virtually all heroin is, in fact, illegally imported. *Turner* v. *United States*, 396 U. S. 398, 408 (1970). The same is not true of marijuana. *Leary* v. *United States*, 395 U. S. 6, 46 (1969).

Where the trier of fact is "free to credit or reject the inference" there is no constitutional infirmity unless "under the facts of the case, there is no rational way the trier of fact could make the connection permitted by the inference." *Ulster County Court, supra*, 442 U. S., at 157. An inference of malice from the use of a deadly weapon clears this hurdle with ease. See generally 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 7.2(b), 192-194 (1986). The overwhelming majority of people who attack others with knives and guns do so with malice.

3. Presumptions shifting the burden of proof.

Most of the recent difficulties with presumptions have involved presumptions shifting the burden of proof. With such a presumption, fact A raises a presumption of element B shifting the burden to defendant to disprove B. Before *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979), it was common to instruct juries that a person is rebuttably presumed to intend the natural and probable consequences of his voluntary acts. This well-established rule was expressly approved by this Court in *Allen* v. *United States*, 164 U. S. 492, 496 (1896) and *Agnew* v. *United States*, 165 U. S. 36, 49-50 (1897). Under this instruction, if the prosecution proves the predicate facts that the defendant committed the act, that he did so voluntarily, and that the resulting harm was the natural and probable consequence of the act, then the law required the conclusion that the defendant intended the harm, unless he proved otherwise.

Sandstrom held that this instruction violated the constitutional right to the due process of law if the presumption was conclusive or if it shifted the burden of persuasion. *Agnew* was stated to be "inapplicable" because of two distinctions: "the trial court's instruction expressly stated that the presumption was refutable, and this Court found that *other* problems with

the instruction were cured by the charge considered as a whole." *Sandstrom*, 442 U. S., at 519, n. 9 (emphasis added). The fact that the presumption in *Agnew* was "refutable" does not distinguish the cases, because *Sandstrom* held that such presumptions were invalid. The second distinction is irrelevant if the "other problems" referred to are problems other than the shift in the burden of proof. If this clause is meant to imply tnat *Agnew* held that the shift of the burden was one of the problems cured by other instructions, then it is simply wrong. *Agnew* squarely held that the shift in the burden was proper. 165 U. S., at 49-50. The "other problem" that was cured was the instruction that the countervailing evidence had to disprove intent beyond a reasonable doubt. *Id.*, at 50.

One of the curative instructions in *Agnew* was that "such inference can only be overcome by evidence satisfactory to you that there was no such intent." *Ibid.* An instruction that *Sandstrom* would have held to *be* error was one that *Agnew* held to *cure* error. *Sandstrom* overruled *Agnew* while pretending to distinguish it. The slowness of trial courts to amend their instructions to comply with *Sandstrom* may be due in part to the *Sandstrom* Court's own failure to honestly acknowledge how much long-established law it was throwing out.

As noted by the concurrence in *Carella*,[2] *Rose* v. *Clark*, 478 U. S. 570 (1986) endorsed two methods of finding this type of error harmless. One method is to find that the predicate facts conclusively establish the presumed fact. *Id.*, at 580. "In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Id.*, at 581.

It is difficult to see the difference between this "harmless error" standard and a conclusion that the presumption in question is not error at all. *Sandstrom* is an implementation of

2. See *supra* p. 6.

Winship;[3] if *Winship* is satisfied, there is no *Sandstrom* error. Perhaps this portion of *Rose* v. *Clark* would be better interpreted as recognizing an exception to the *Sandstrom* rule. If "the strength of the connection between the particular basic and elemental facts involved," *Ulster County Court*, *supra*, 442 U. S., at 156, is great *enough*, a presumption may be logically and constitutionally valid.

A second type of harmless error approved by *Rose* v. *Clark* is for cases where the evidence of the presumed element is so overpowering "that no rational jury would need to rely on an erroneous presumption instruction to find" that element. 478 U.S., at 581, n. 10. While this type of harmless error analysis could be used to sustain the judgment in the present case, it is not necessary to do so.

4. Presumptions shifting the burden of producing evidence.

Under the view of presumptions generally accepted early in this century, there is only one kind of true presumption. The traditional view is stated by Thayer, *supra*, at 346 (emphasis added):

> "It is one of the commonest of errors to misapprehend the scope and limitations of the ordinary rules and maxims of presumption; and to attribute to them a mistaken quality and force. They are, as we have seen, merely *prima facie* precepts; and they presuppose only certain specific and expressed facts. *The addition of other facts, if they be such as have evidential bearing, may make the presumption inapplicable*. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of

3. "It is the line of cases urged by petitioner and exemplified by *In re Winship*, 397 U. S. 358 (1970) that provides the appropriate mode of constitutional analysis for these kinds of presumptions." *Sandstrom*, *supra*, 442 U. S., at 519 (footnote omitted).

> presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. Of course the considerations which have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasize their quality as evidence; but the main point to observe is, that the rule of presumption has vanished. . . . "

Thayer's view was adopted with vigor by Wigmore:

> "[W]hat is the effect upon the legal situation of the opponent if he does respond to this duty and *comes forward with other evidence* against the fact presumed? The case is now open again as to that specific issue . . . and is before the jury, where the original proponent . . . has the other burden of proof in the sense of the risk of nonpersuasion of the jury. The important thing is that there is now *no longer in force any ruling of law by the judge* requiring the jury to find according to the presumption." 9 Wigmore, *supra*, § 2487 at 296 (emphasis in original).

The Thayer-Wigmore view has been subject to considerable criticism. See *id.*, § 2493a, at 309, n. 2. It is often called the "bursting bubble" approach. The principal criticism has been that this view gives too *little* effect to the presumption. "Its unreason consists in assigning so slight and evanescent procedural effect to every presumption." Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937). "[I]t is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect." Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 82 (1933).

Morgan was particularly concerned with the destruction of a presumption by testimony "which anybody can disbelieve, which comes from interested witnesses, and which is the sort that is usually disbelieved." 9 Wigmore, *supra*, § 2493 at 315, quoting 18 A.L.I. Proceedings 221 (1941). Yet this is the classical Thayer view of presumptions, and if the jury is so instructed then the due process analysis must proceed on that basis.

There is to date no concrete guidance on the constitutional implications of this type of presumption in a criminal case. *Ulster County Court*, *supra*, 442 U. S., at 157, n. 16 noted in dicta that "it may well be that [the presumption's] impact is no greater than that of a permissive inference, and that it may be proper to analyze it as such." See also *id.*, at 169, n. 2 (Powell, J., dissenting). The Court in *Sandstrom* v. *Montana*, 442 U. S. 510, 515 (1979) specifically declined to decide whether presumptions shifting the burden of production were constitutional; the Court rejected that characterization of the presumption in question. *Francis* v. *Franklin*, 471 U. S. 307, 314, n. 2 (1985), also expressly disclaimed any opinion on the question. In *Rose* v. *Clark*, 478 U. S. 570, 576, n. 5 (1986), the majority assumed without deciding that *Sandstrom* error had occurred.

This Court's prior opinion in the present case did not examine the presumption in any depth. The opinion noted that the state court had held that "the instruction in petitioner's case was infirm for the reasons 'addressed in *Francis*,' " *Yates* v. *Aiken*, 484 U. S. 211, 214-215 (1988) and devoted the substance of the opinion to retroactivity. *Id.*, at 215-218.

B. The Deadly Weapon Presumption in this Case.

The instruction in the present case contains two sentences specifically dealing with deadly weapons. The second sentence appears to have been largely overlooked in the proceedings to date.

> "I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, *the presumption is removed*." J. A. 96 (emphasis added).

This is a "bursting bubble" presumption. As evidence of the actual circumstances is introduced, there comes a point where the jury is instructed to disregard the presumption. Assuming, without conceding, that the instruction is *Sandstrom* error to begin with, the harmless error determination must first consider whether the bubble has burst.

"The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence" is now "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in that way. *Boyde* v. *California*, 110 S. Ct. 1190, 1197-1198, 108 L. Ed. 2d 316, 328-329 (1990).[4] Thus, assuming at this point that the presumption, if used, would have impermissibly restricted the jury, see *Ulster County Court*, *supra*, 442 U. S., at 156, the threshold question is whether there is a reasonable likelihood that the jury used the presumption at all.

Presumptions of this type disappear when a certain quantum of evidence has been introduced. In this case that quantum was described to the jury as "when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to . . . ." J. A. 96. There are only two ways that the jury in this case could have given effect to the presumption. Either they would have to find that the circumstances had not been testified to, or they would have to disobey the second half of the instruction.

The second possibility has no place in a *Sandstrom* analysis, for the entire foundation of the *Sandstrom* rule is the premise that the jurors duly obey their instructions. See *Francis* v. *Franklin*, *supra*, 471 U. S., at 324, n. 9. That premise has been questioned, to be sure. "No extended experience at the bar or

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4. A summary, per curiam opinion recently cited the *Francis* v. *Franklin* standard discarded by *Boyde*. *Cage* v. *Louisiana*, 111 S. Ct. 328 (Nov. 13, 1990). Such a citation should not by itself be construed to overrule a case decided after full briefing and argument. See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 280-287 (6th ed. 1986) (criticism of summary per curiam dispositions).

upon the trial bench is required to produce a vivid realization that only in the exceptional case is the jury decisively influenced by the judge's instructions. And in still rarer instances is its determination based upon the allocation of the burden of persuasion." Morgan, *supra*, 47 Harv. L. Rev., at 59. If this skeptical view were accepted, though, *Sandstrom* error would virtually always be harmless, if indeed there would even be a *Sandstrom* rule. Instructions ignored by the jury can hardly constitute a prejudicial violation of constitutional rights. Assuming the jury obeyed its instructions, is there a reasonable likelihood that the jury did *not* find that "the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to"? Amicus submits there is not.

This is an unusual murder. We have two living witnesses, one on each side, who participated in the events and testified to largely the same story. Relatively few murder juries have the luxury of such a complete picture. The essential circumstances of Yates' use of his gun, according to Yates himself, are these. Yates carried a loaded gun into Wood's store for the purpose of armed robbery. The robbery victim, Wood, handed over the money without resistance. When Yates' accomplice, Davis, demanded that Wood place himself in a defenseless position, Wood refused and made a motion which Yates interpreted as going for his own gun. On Davis' command, Yates "leveled [his gun] off at [Wood] and fired right quick . . . ." J. A. 52-58. The only substantial difference in Wood's testimony was that he went for his gun after he had been shot. J. A. 18-19.

If this testimony does not put the circumstances surrounding the use of the weapon into evidence, it is difficult to imagine what would. By any standard, a jury following these instructions could not have applied the presumption to Yates' use of the gun. They were instructed that on this state of the evidence "the presumption is removed." If the instruction is federal error at all, it is harmless by any standard as to Yates' weapon use.

The circumstances of Davis' use of his weapon are almost as well known. Davis entered the store with his knife for the

specific purpose of robbery. He brandished it for the purpose of intimidating Mr. Wood into turning over his money. He demanded that Mr. Wood bend over the counter in a helpless position. When Mr. Wood refused, Davis ordered Yates to shoot Mr. Wood, which he did. Davis then fought with Mr. Wood. Mrs. Wood entered and tried to help her son, and in the course of the fight Davis stabbed Mrs. Wood through the heart with his knife, penetrating the full thickness of her chest. J. A. 32.

Davis made two uses of weapons. He personally used his own knife, and he commanded Yates to use the gun. Can it honestly be said that the circumstances surrounding these uses have not "been put in evidence and testified to"? How much evidence would a reasonable juror require before concluding that the presumption is removed under this instruction?

The test under *Boyde* is whether there is a reasonable likelihood that the jury has applied the instruction in such a way as to be unconstitutionally constrained. *Boyde*, *supra*, 110 S. Ct., at 1198, 108 L. Ed. 2d, at 329. No such likelihood appears here, regardless of whether the jury was considering Yates' malice or Davis'. Even under the strictest possible standard, it is beyond reasonable doubt that the jury found the circumstances to be in evidence and thus did not feel constrained by the presumption. The deadly weapon presumption, if error at all,[5] was harmless error.

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5. *Amicus* believes that the dictum in *Ulster County Court* is correct and that this instruction is not error at all. See *supra* p. 11. However, that issue was implicitly resolved against the state in the prior opinion in this case, and the question can wait for a more appropriate case for full consideration.

II. The unlawful act instruction is not *Sandstrom* error.

A. The Procedural Posture of the Issue.

When this case was previously before this Court, the only issue considered related to the deadly weapon presumption. See *Yates* v. *Aiken*, 484 U. S. 211, 212 (1988). The prior disposition by the state court rested on the nonretroactivity of *State* v. *Elmore*, 279 S. C. 417, 308 S. E. 2d 781 (1983), which also involved only a deadly weapon presumption. See *Yates* v. *Aiken*, 290 S. C. 231, 349 S. E. 2d 84, 85 (1986).

On remand, the state supreme court stated at one point that it was merely "[a]cquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption." *Yates* v. *Aiken*, 391 S. E. 2d 530, 531 (S.C. 1989). At another point, however, the court separately notes the "willful deliberate and intentional doing of an unlawful act without any just cause or excuse" portion and states that this charge is "erroneous." 391 S. E. 2d, at 532. The court does not analyze this question in any depth, however. The question of whether the latter instruction is federal constitutional error at all has never been decided by this Court explicitly or implicitly.[6] It did not receive any significant attention in the court below.

The questions presented by the petition for certiorari deal with harmless error. However, questions "fairly included therein" are also proper for consideration. Sup. Ct. Rule 14.1(a). Whether an instruction is error at all is a question fairly included in the question of whether it is harmless error.

B. The Trouble with "Malice."

In common usage, "malice" is a simple word. It means a "desire to harm others or to see others suffer." *The American Heritage Dictionary* 759 (2nd ed. 1985). In law, though, "mal-

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6. Cf. note 5 *supra*.

ice" is a chameleon word, changing its meaning to match policy objectives in each area of the law where it is used. In the First Amendment defamation jurisprudence, for example, "actual malice" refers to knowledge or recklessness disregard of the falsity of the statement. *New York Times* v. *Sullivan*, 376 U. S. 254, 279-280 (1964). This "convenient shorthand expression " has virtually nothing to do with the meaning of "malice" in the traditional tort law of defamation. See *Cantrell* v. *Forest City Pub. Co.*, 419 U. S. 245, 251-252 (1974). The use of the word "malice" in the law sometimes comes uncomfortably close to Lewis Carroll's famous parody. Cf. L. Carroll, *Through the Looking Glass* ch. 6 (1872).

"Though murder is frequently defined as the unlawful killing of another 'living human being' with 'malice aforethought,' in modern times the latter phrase does not even approximate its literal meaning." 2 W. LaFave and A. Scott, *Substantive Criminal Law* § 7.1, 181 (1986). The relationship between "malice" and intent in the law of homicide is unique, and it calls for a unique analysis of the *Sandstrom* problem.

A modern definition of intentional homicide omits any mention of malice. "Conduct, accompanied by an intent to kill, which legally causes another's death constitutes murder, unless the circumstances surrounding the homicide are such that the crime is reduced to voluntary manslaughter or such that the intentional killing is justifiable or excusable . . . . " *Id.*, § 7.2 at 191. The Model Penal Code is in accord. "Except as provided in Section 210.3(1)(b) criminal homicide constitutes murder when: ¶(a) it is committed purposely or knowingly . . . . " *Model Penal Code* § 210.2(1) (1974). The exception noticed is the definition of voluntary manslaughter: "a homicide *which would otherwise be murder* is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." *Id.*, § 210.3(1)(b) (emphasis added).

It is a mistake, then, to think of malice and intent as separate elements of murder, with murder requiring both elements but voluntary manslaughter requiring intent but not malice. See 2 LaFave and Scott, *supra*, § 7.1 at 183. The intentional

killing of another person *is* murder unless one of the exceptions applies.

C. The Instruction in This Case.

Traditional language dies hard, however, especially when it is written into statutes. South Carolina defines the offenses of murder and manslaughter in the traditional manner, with the presence or absence of "malice" being the distinguishing factor. S. C. Code §§ 16-3-10, 16-3-50. So do many other jurisdictions. See, *e.g.*, 18 U. S. C. §§ 1111, 1112; Cal. Pen. Code §§ 187, 188, 192.

Notwithstanding the archaic wording, though, the actual definition of the crime follows the model described by LaFave and the Model Penal Code. "All that is required for murder is the mental state of malice, provided by the intent to kill a human being, coupled with an act which caused the death of a human being." *State* v. *Horne*, 282 S. C. 444, 319 S. E. 2d 703, 704 (1984).

Malice is not a separate fact which is merely logically inferred from intent. Malice *is* intent, except that the law provides certain exceptions under which some killings will be deemed to be "without malice," even though they are intentional.[7] See *State* v. *Gathers*, 295 S. C. 476, 369 S. E. 2d 140 (1988), *aff'd* 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989). The instruction on express malice in the present case shows the equivalence, absent an applicable exception, of intent and malice.

> "Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show

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7. There are other variations on murder which do not require intent to kill. See 2 LaFave, *supra*, § 7.1, at 183-184. They need not be considered here, as the jury was not instructed on them.

directly that an intent to kill was really and actually entertained." J. A. 96 (emphasis added).

If the state's evidence *directly* shows intent to kill, then it has shown express malice. Implied malice differs only in the manner of proof. "The words 'express' or 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown." *Ibid.*

After defining express malice, the instruction goes on to define implied malice. "Malice may also be implied as where, although no expressed *intention to kill* was proved by direct evidence, it *is indirectly and necessarily inferred from facts* and circumstances *which are*, themselves, *proved*." *Ibid.* (emphasis added). Again, the jury was instructed that if the prosecution has proven intent to kill it has proven malice. This is not a case where one fact raises a presumption of another, as the deadly weapon presumption discussed in part I does. This is a case where the proven fact *is* the element of the offense *by definition* of the element, absent a recognized exception.

This unobjectionable definition of implied malice is followed by this sentence:

> "Malice is implied *or presumed* by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." J. A. 96 (emphasis added).

Without the words "or presumed," this instruction would be similar to the one approved in *Gathers*, *supra*. In *Gathers*, "[t]he trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or provocation appears. This charge was proper." 369

S. E. 2d, at 143.[8]

Like the preceding sentence, and unlike *Sandstrom* and *Franklin*, intent is not being presumed here. Cf. *Sandstrom* v. *Montana*, 442 U. S. 510, 513 (1979); *Francis* v. *Franklin*, 471 U. S. 307, 311 (1985). Intent is one of the predicate facts to be proven, the others being the unlawful act and absence of a just cause or excuse.

The first question is whether the words "or presumed" add anything of significance to the instruction. The instruction approved in *Gathers* told the jury that if the intent to do the unlawful act was proven and any claim of excuse or provocation was disproven, then implied malice was established. See 369 S. E. 2d, at 143. The words "or presumed" change nothing in this instruction if the jury interprets "presumed" in this context to be simply a synonym of "implied." That is the most likely interpretation and the one probably intended by the trial judge.

The only other reasonable interpretation is that the words "or presumed" soften the definition of implied malice. That is, they could be taken to imply that even if the jury found the intent, unlawful act, and lack of excuse beyond a reasonable doubt, they could still find absence of malice through some form of rebuttal evidence. Such a misinterpretation of the definition of implied malice could only benefit the defendant.

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8. The instruction in the present case also omits mention of provocation. Instruction on provocation, which would permit a verdict of voluntary manslaughter, would be constitutionally required if and only if there were any evidence to support it. *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Hopper* v. *Evans*, 456 U. S. 605 (1982). If manslaughter were in issue, placing the burden on defendant to prove provocation would not be permitted. *Mullaney* v. *Wilbur*, 421 U. S. 684, 703-704 (1975). Based on Yates' own description of the events, J. A. 54-58, manslaughter is not in issue here. The victim's justified use of force is not legally sufficient provocation in South Carolina. *State* v. *Norris*, 253 S. C. 31, 168 S. E. 2d 564, 567 (1969).

The word "presumed" in this instruction is inartful and unnecessary, and it ought to be discouraged. But it does not violate any constitutional right of the defendant. If the instruction in *Gathers* was constitutional, this one was also.

A second attack on the instruction involves the "unlawful act" component of implied malice. Petitioner asserts that the fact that defendant committed *robbery* is "the predicate fact[] triggering the presumption[] of malice . . . ." Pet. Brief 35. By this construction, petitioner would transform the instruction into a presumptive felony murder rule. Indeed, this construction would go much farther than the felony murder rule and imply malice for homicide from *any* intentional unlawful act, from treason to jaywalking.

To decide whether it is likely that the jury interpreted this instruction in this manner, a court should look at the instruction as lay jurors would. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde* v. *California*, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316, 329 (1990).

The sentence in question immediately follows two sentences discussing specific intent to kill. J. A. 96. The sentence comes in the middle of a very long instruction on murder, not robbery, which begins by defining murder as "the *unlawful killing* of any human being with malice aforethought." J. A. 95 (emphasis added). Finally, the implied malice instruction concluded with admonition of jury's responsibility "under all the evidence to make a determination as to whether *malice existed in the mind of the killer at the time the fatal blow was struck*." J. A. 96-97 (emphasis added).

Concepts of substituted *mens rea* such as felony murder and transferred intent may be second nature to lawyers and judges, but they are utterly foreign to most people. In the context of this instruction, the jurors would need a powerful inducement to believe that the "unlawful act" referred to was any act other than the killing of Helen Wood.

One indication of how the instruction was actually understood at trial is the reaction to it of the participants in the trial.

> "The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach great importance to the character of the objection, if any, asserted by the defendant's counsel. . . . " *Rose* v. *Lundy*, 455 U. S. 509, 547, n. 17 (Stevens, J., dissenting).

Malice was a key element of the prosecution's case. If the jury were actually being instructed to presume malice from the undisputed fact of Yates' participation in the robbery, one would expect to find a vigorous objection to the instruction. The lack of an objection is a strong indication that, in the context of the trial, the instruction was not crucial to the defense case. See *Engle* v. *Isaac*, 456 U. S. 107, 136, n. 1 (1982) (Stevens, J., concurring in part).

Looking over to the other side, the presumption is curiously absent from the prosecutor's argument.[9] One would expect an advocate with the benefit of a presumption of a key element of his case from an undisputed fact to hammer that point home. Yet the presumption is not even mentioned. J. A. 83-89. The entire argument deals with the robbers' intent to kill.

In *Boyde*, *supra*, the question was whether the jury had "applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 110 S. Ct., at 1198, 108 L. Ed. 2d, at 329. The test established was "reasonable likelihood." *Ibid*. The question here is essentially

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9. Without access to the full record, *amicus* must assume that the parties have excerpted in the Joint Appendix the portion of the argument relevant to the disputed presumptions.

the same. It is whether the jury has applied the challenged instruction in a way that "curtails the fact finder's freedom to assess the evidence independently." *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979). There is not a reasonable likelihood that the jury applied the instruction in such a manner.

The predicate fact which triggered the presumption if it is a presumption, was the intentional act of stabbing Helen Wood. That intent establishes malice where, as here, there is no evidence whatever to warrant a verdict of manslaughter or justifiable or excusable homicide. The "unlawful act" instruction is not federal constitutional error at all.

Alternatively, the instruction may be considered the first type of harmless error recognized in *Rose* v. *Clark* and accepted by the *Carella* concurrence even for conclusive presumptions.[10] That is, "the predicate facts . . . are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact." *Carella* v. *California*, 109 S. Ct. 2423, 105 L. Ed. 2d 225-226 (1989) (Scalia, J., concurring in the judgment).

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Dated: December, 1990

Respectfully submitted,

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10. See *supra* pp. 6, 8-9.